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IN PERSONAM JURISDICTION UNDER MISSISSIPPI'S LONG ARM STATUTE

*William H. Brown, Jr. and Sam E. Scott**

I. Due Process And The Original Long Arm Statute

Mississippi practitioners have long been plagued with the problem of how to subject nonresidents to suit in this state when personal service of process could not be effected within the boundaries of the forum.[1] Prior to 1940 in personam jurisdiction could not be acquired over a nonresident defendant unless he was personally served with process within the state, was a foreign corporation found to be doing business herein,[2] or was subject to service of process under the nonresident motorist statute.[3] In order to remedy this problem the Mississippi legislature in 1940[4] enacted this state's first long arm statute.[5] This statute provided for service of process over nonresident individuals, firms, partnerships and foreign corporations not qualified to do business in this state " . . . who shall do any business or perform any character of work in this State. . . ."[6] The doing of such business or the performance of such work was deemed as a signification of the nonresident's agreement that the Secretary of State of Mississippi was to serve as agent for service of process in any action growing out of the work or services in question.[7] It is the purpose of this article to trace the development of in personam jurisdiction[8] under Mississippi's long arm statute from its inception to the present and by analyzing the cases decided thereunder to provide some insight into its practical application.

The original statute was posited in terms of whether the nonresident was "doing business" within the forum probably because of the decision of *Pennoyer v. Neff*[9] and its progeny. In *Pennoyer* the United States Supreme Court held that the due process clause of the fourteenth amendment[10] required that for a state court to exercise jurisdiction over a nonresident defendant, he must be physically present within the forum or consent to the court taking jurisdiction.[11] This requirement came to be known as the "physical power doctrine." Since a literal interpretation of this doctrine tended to be restrictive in nature, it was not long before various legal fictions were developed in order to find that a nonresident was "present" within the forum or had "consented" to the assertion of jurisdiction.[12] The "doing business" test was one of the exceptions carved out of the physical power doctrine.[13] In an early article which treated Mississippi's long arm statute this test was discussed as follows:

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[1] *See, e.g.,* Lee v. Memphis Publishing Company, 195 Miss. 264, 14 So. 2d 351 (1943).

[2] Miss. Code Ann. § 4166 (1930).

[3] Miss. Code Ann. §§ 1845, 1846 (Supp. 1938).

[4] *See* Comment, *The Recent Mississippi Statute Conferring Jurisdiction Over Nonresident Individuals and Partnerships,* 13 Miss. L.J. 559 (1941).

[5] Gen. Laws Miss. 1940 ch. 246.

[6] *Id.*

[7] *Id.*

[8] The term "jurisdiction" as used in this article refers to the power of the court to render a valid judgment, adjudicating the rights of parties as between themselves. In rem and quasi in rem jurisdiction are not within the scope of this discussion.

> The first deviation from the physical power doctrine, as applied to proceedings in personam, arose in cases involving foreign corporations. But rather than overrule *Pennoyer v. Neff,* or specifically create an exception to it, the Supreme Court of the United States chose to create fictions in order to bring its holding within the rule of *Pennoyer v. Neff.* Since personal jurisdiction, under physical power, could only be acquired by consent or presence; the Court created the "doing business" test by an application of what has become known as the "implied consent" and "presence" fictions. A state has the power, reasoned the Court, to arbitrarily exclude a foreign corporation from doing business in the state (power of exclusion theory); and having that power, it also has the power to set up conditions for its admission into the state, one of which is to compel it to submit to the jurisdiction of the courts of the state. In other cases, the Court reasoned that the doing of business by a foreign corporation indicated that it was present within the state for purposes of personal jurisdiction.
>
> . . . .
>
> Although these fictions were clearly artificial, they served their purpose, which was to extend the personal jurisdiction of the

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[9] 95 U.S. 714 (1878).

[10] U.S. CONST. amend. XIV.

[11] 95 U.S. at 733.

[12] *See, e.g.,* Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927); International Harvester v. Kentucky, 234 U.S. 579 (1914); Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907); Old Wayne Mutual Life Ass'n. v. McDonough, 204 U.S. 8 (1907); and St. Clair v. Cox, 106 U.S. 350 (1882).

[13] *See* Comment, *In Personam Jurisdiction Over Nonresidents,* 29 MISS. L.J. 91 (1957).

> state courts over nonresidents and at the same time preserve the rule of *Pennoyer v. Neff*. . . .[14]

This seems to be the only reasonable explanation for the "doing business" concept incorporated in Mississippi's first long arm statute. In 1945 the requirements of due process were substantially relaxed by the United States Supreme Court in the case of *International Shoe Co. v. Washington*,[15] which is thought by many to be the single most important decision ever rendered in this field.[16] The *International Shoe* case involved a suit by a state commission against a nonresident corporation to recover company contributions to a state unemployment commission fund. International Shoe Company was a Delaware corporation with its principal office in St. Louis, Missouri, employing eleven to thirteen salesmen who regularly solicited orders in the state of Washington. The company maintained no regular office space in the state, on occasion renting space for exhibiting its wares, maintained no stock or merchandise therein, and made no intrastate deliveries. The primary contention of the defendant was that it was not "present" within the state of Washington and therefore could not be subjected to jurisdiction of the Washington court. Establishing new criteria for the requirements of due process, the Court did away with the "consent" and "presence" theories and held that a nonresident was subject to in personam jurisdiction if he had certain "minimum contacts" with the forum state and the assumption of jurisdiction would not offend traditional notions of fair play and substantial justice.[17]

The next significant development in the Supreme Court's continuing formulation of the requirements of due process came in the case of *McGee v. International Life Insurance Co.*[18] In this case the Court upheld the constitutionality of a California statute[19] which permitted residents to bring suit against nonresident insurance companies on policies of insurance solicited from outside the state by mail. The Court was of the opinion that due process was satisfied by the fact that ". . . the suit was based on a contract which had substantial connection with that state."[20] Commenting on the trend of expansion of state jurisdiction over nonresidents, the Court noted that increasing nationalization of commerce and developments in communication and transportation made it less burdensome for a nonresident to defend himself in a state where he was economically engaged. This case represents a clear departure from the doctrine of *Pennoyer v. Neff.*

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[14] *Id.* at 91, 92.

[15] 326 U.S. 310 (1945).

[16] *See* Reese, *Judicial Jurisdiction Over Non-Residents; The Impact of McGee v. International Life Insurance Company*, 13 Record of N.Y.C.B.A. 139, 146 (1958).

[17] 326 U.S. at 316.

[18] 355 U.S. 220 (1957).

[19] CAL. INS. CODE §§ 1610-20 (West 1955).

[20] 355 U.S. at 223.

However, the full impact of the liberal interpretation of the "minimum contacts" doctrine announced in *McGee* had not been fully digested when limitations were imposed by the decision of *Hanson v. Denckla.*[21] That case arose as the result of a dispute between a settlor, who was a resident of the State of Florida, and a Delaware corporation over part of the corpus of a trust held by the latter as trustee. In order to adjudicate the rights of the parties to the funds in question, a Florida court attempted to exercise jurisdiction over the trustee through constructive service. The only connection between the trustee and the state of Florida was certain correspondence between the trustee and the settlor, the exercise of his power of appointment over the trust by the settlor in Florida, and the receipt of trust income by the settlor there. The Supreme Court held that the Florida court could not properly assert jurisdiction over the nonresident defendant and reaffirmed the rule announced in earlier decisions that due process required that a nonresident have some "minimal contacts" with the forum state before jurisdiction could properly be asserted. In order to satisfy this "minimal contacts" requirement the defendant must have done some act within the state whereby it availed itself of the privileges of conducting activities within the forum (thus invoking the benefits and protections of the laws of the forum), and the cause of action must arise out of the activities of the defendant within the forum.[22]

Thus, *International Shoe, McGee,* and *Hanson* firmly establish that the due process clause requires only a "minimal contact" with the forum for the assertion of in personam jurisdiction over a nonresident. However, it should be noted that although state courts must remain within the constitutional limitations imposed by these cases, they may adopt a more limited interpretation of the requirements of due process.[23] This has been the case in Mississippi. In order to properly illustrate the development of due process and the concept of doing business, a brief review of Mississippi decisions under the original long arm statute is necessary. It is felt that these early cases are vital to a full understanding of current decisions dealing with in personam jurisdiction, since the basis for assertion of jurisdiction contained in the original statute (doing business) has been retained in the subsequent amendments to the statute.

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[21] 357 U.S. 235 (1958).

[22] *Id.* at 251, 253.

[23] *See, e.g.,* Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

The first case in which the Mississippi Supreme Court construed the long arm statute was *Lee v. Memphis Publishing Co.,*[24] which was to have controversial[25] but lasting effect upon future applications of the statute.[26] This case involved a libel suit by a resident of Mississippi against the Memphis Publishing Company, a Delaware corporation, which published the *Commercial Appeal* newspaper wherein the allegedly libelous statements appeared. The court held that the defendant was not "doing business" in Mississippi within the meaning of the long arm statute although the *Commercial Appeal* had a circulation of over 40,000 papers throughout this state, maintained a regular office in Jackson, Mississippi, which was run by one of its full-time employees, and had a large number of local distributors within the state who were managed by a full-time employee of the defendant.

Sugg v. Hendrix[27] was the first case which expressly ruled on the constitutionality of Mississippi's long arm statute. In *Sugg* the plaintiff, a resident of Mississippi, instituted suit against the defendant, a resident of Louisiana, to recover damages for personal injuries incurred while working for the defendant. The plaintiff sought to secure jurisdiction over the defendant under the Mississippi long arm statute, alleging that the defendant was engaged in extensive levee construction work in this state and that his injury had arisen out of such work. The defendant appeared specially, moving to quash service on the ground that the Mississippi statute was unconstitutional. In upholding the constitutionality of the long arm statute, the court relied heavily upon the decision of *Hess v. Pawloski,*[28] wherein the United States Supreme Court held that the state of Massachusetts, under its police power, could subject a nonresident motorist to suit in Massachusetts in any case arising out of the nonresident's use of the highways of that state. Drawing on dictum in that case, the Fifth Circuit Court of Appeals reasoned that if the Mississippi legislature had the power to require an employer, resident or nonresident, to carry workmen's compensation insurance for the protection of his employees, it could also require an employer to comply with this state's laws subjecting them to suit for any injuries incurred by residents of this state as a result of their business activities herein. The court commented that in construing a statute of this nature the real question was whether or not it constituted the reasonable exercise of the police power of the state; and if it were determined that the statute was enacted for the protection of the health, safety, and welfare of residents, rather than as a mere attempt to extend the bounds of in personam jurisdiction, then it was constitutional.

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[24] 195 Miss. 264, 14 So. 2d 351 (1943).

[25] The dissent in Lee commented that the majority opinion taxed the credibility of the ordinary mind. 14 So. 2d at 355.

[26] *See* Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

[27] 142 F.2d 740 (5th Cir. 1944).

[28] 274 U.S. 352 (1927).

In *Condon v. Snipes*[29] the constitutionality of the long arm statute was again raised. In that case the plaintiff, a Mississippi resident, instituted suit against a nonresident defendant, seeking to recover damages for a breach of contract. The defendant was engaged in the termite eradication business, and the controversy in question arose out of the defendant's treatment for termites of a building owned by the plaintiff. Service of process was effectuated under the Mississippi long arm statute, and the defendant moved to dismiss, alleging that assertion of jurisdiction was violative of due process. Upholding the validity of the long arm statute, the Mississippi Supreme Court noted that the defendant was engaged in a field (termite eradication) which was specifically regulated by the state under a statute enacted for the protection of the citizens of this state. Since the defendant was engaged in a business which was the subject of state control, and the cause of action arose out of such business, he could be subjected to service of process under the Mississippi statute.

It is obvious that each of the three cases discussed immediately above was influenced strongly by the concept which existed prior to *International Shoe* that jurisdiction and physical power are synonymous. However, this approach was finally discredited in *Davis-Wood Lumber Co., Inc. v. Ladner.*[30] There the plaintiff, a resident of Mississippi, brought an action to recover for work done under a contract with the defendant, a nonresident of this State. The Mississippi Supreme Court was of the opinion that the facts in the case warranted the conclusion that the defendant was doing business in this state; however, the important aspect of the decision is that the court did away with the fictions of consent (implied or express) and presence and adopted the more modern "minimal contacts" theory as the proper test for determining when jurisdiction could be asserted under Mississippi's long arm statute. The court frankly stated that it was of the opinion that a state ought to have the power to require a person conducting business activities within its boundaries to be answerable in the courts of that state for claims arising out of the business activities in question. The court emphasized that no uniform test could be applied to all situations and that each case should be given individual consideration. Summarizing the court's opinion, it appears that the rule established in this case is: Jurisdiction may be asserted over a nonresident defendant not physically present within the forum when such nonresident has some minimum contact with the forum and the assertion of jurisdiction will not offend the traditional notions of fair play and substantial justice.[31] It is readily apparent that this decision marked the beginning of a broadening of the scope of in personam jurisdiction over nonresidents in Mississippi.

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[29] 205 Miss. 306, 38 So. 2d 752 (1949).

[30] 210 Miss. 863, 50 So. 2d 615 (1951).

In *Mississippi Wood Preserving Co. v. Rothschild*[32] the Fifth Circuit Court of Appeals further refined the test announced by the Mississippi Supreme Court in the *Davis-Wood* case by holding that isolated activity on the part of a nonresident was insufficient to constitute doing business under the provisions of section 1437. The court stated that although the literal wording of the statute was sufficiently broad to include a single transaction, under *Davis-Wood* it was abundantly clear that a series of acts or transactions, continuous in nature, was necessary before a nonresident defendant could be found to be doing business in this State.

Jarrard Motors, Inc. v. Jackson Auto & Supply Co.[33] involved a suit instituted by a local automobile dealer against the nonresident distributor from whom it secured its automobiles. The plaintiff sought to recover damages for breach of a dealership agreement previously entered into by the parties. Holding that the defendant was doing business in this state, the supreme court emphasized the fact that under the contract in question the defendant-distributor possessed almost complete control over the method and manner in which the local dealer did business. The court further noted that the defendant had failed to file its distributor-dealership contract with the Secretary of State as required by Mississippi law.[34]

In *Livestock Services, Inc. v. American Cyanamid Co.*[35] suit was instituted by a Mississippi corporation against a foreign corporation for breach of warranty on a vaccine manufactured by the nonresident defendant. The Mississippi Supreme Court declined to find defendant to be doing business, although it had some ten salesmen working in this state on a regular basis. The court emphasized the fact that none of the defendant's employees working within this state had authority to receive or accept orders on behalf of the defendant. This opinion illustrates the tendency of the Mississippi Supreme Court to follow its earlier decisions rather than the more liberal trend established by the United States Supreme Court,[36] since it appears that the defendant's contacts with the forum were more than "minimal." This case appears to be an anomaly since in rendering its opinion, the court failed to rely upon any of its prior major decisions and based its decision on a relatively obscure case.[37]

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[31] This test simply applies the basic requirement of the due process requirement announced by the United States Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[32] 201 F.2d 233 (5th Cir. 1953).

[33] 237 Miss. 660, 115 So. 2d 309 (1959).

[34] MISS. CODE ANN. §§ 8072, 8073 (1956).

[35] 244 Miss. 531, 142 So. 2d 210 (1962).

In *Century Brick Corp. of America v. Carroll*[38] a Mississippi franchise dealer brought an action against a foreign corporation, seeking to have the franchise adjudicated a nullity and to recover money paid to the defendant for such franchise. Service of process was effectuated under section 1437, and the defendant appeared specially to contest jurisdiction. The Mississippi Supreme Court noted that the defendant had sent its representatives into the state to solicit local dealers' applications for franchises and had exercised a large degree of control over local dealers once franchises were granted. Considering these facts and relying primarily on *Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*,[39] the court found that Century was doing business in this state. The continuity test was met by a finding that Century's representatives' activities within this state were more than isolated acts and, in fact, had been continuous and systematic. The court placed heavy emphasis upon the fact that Century had retained substantial control over the manner in which local franchise owners operated their businesses. The court was of the opinion that these circumstances satisfied the minimal contact requirement and that maintenance of the suit did not offend "traditional notions of fair play and substantial justice."[40]

In *Hazell Machine Co. v. Shahan*[41] suit was instituted by a Mississippi resident against a foreign corporation to recover a balance due on an open account and for breach of an oral contract previously entered into by the parties. Under the terms of the contract in question, Shahan was to serve as a local distributor of rebuilt motors for the defendant. Both parties were to work together in the promotion of the defendant's product in Mississippi. In furtherance of this contract, an agent of the defendant secured office space for the plaintiff and aided the plaintiff in securing the financing necessary to open his business. The supreme court found that the nonresident was doing business in this state and that the defendant had entered a general appearance by filing an answer in this cause, thereby waiving its right to question jurisdiction.

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[36] *See* Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

[37] Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 83 So. 2d 179 (1955).

[38] 247 Miss. 514, 153 So. 2d 683 (1963).

[39] 237 Miss. 660, 115 So. 2d 309 (1959).

[40] 247 Miss. at 521, 153 So. 2d at 688.

[41] 249 Miss. 301, 161 So. 2d 618 (1964).

In *Walker v. Savell*[42] the Fifth Circuit Court of Appeals was again called on to review section 1437 and to interpret the manner in which it had been construed by the Mississippi Supreme Court. The suit arose as a result of an article written by Savell, a Mississippi resident, and distributed by the Associated Press to its various members. The facts showed that the activities of the defendant in Mississippi were no more and, in fact, probably less than the publisher of the *Commercial Appeal* in the *Lee* case.[43] Reviewing the state court decisions, the court found that neither the *International Shoe*[44] case, its successors,[45] nor subsequent decisions of the Mississippi Supreme Court[46] had relaxed the requirements for doing business and that the activities of the Associated Press were probably less than those of the publisher of the *Commercial Appeal.* In fact, the court noted that perhaps the strictness of the doctrine came from a recognition of the threat a contrary ruling would pose to freedom of the press, though the court did point out with candor that such was not mentioned in the opinion. One can only conclude that *Lee*[47] is still good law at least insofar as concerns activities of the press.

Mladinich v. Kohn[48] must now be considered the leading case in determining whether a nonresident is doing business in Mississippi. Kohn, a nonresident, was sued for slander, alleged to have been committed in a speech delivered in Mississippi before a religious association and for which Kohn received no remuneration. The court held that Kohn was not doing business, nor did he perform any character of work or service in this state under the statute. The court held that three basic factors must coincide for the state courts to have jurisdiction:

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[42] 335 F.2d 536 (5th Cir. 1964).

[43] 195 Miss. 264, 14 So. 2d 351 (1943).

[44] 326 U.S. 310 (1945).

[45] *See, e.g.,* Travelers Health Assoc. v. Virginia, 339 U.S. 643 (1950).

[46] *See, e.g.,* Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951).

[47] 195 Miss. 264, 14 So. 2d 351 (1943).

[48] 250 Miss. 138, 164 So. 2d 785 (1964).

1. The nonresident must purposefully do some act or consummate some transaction in this state.
2. The cause of action must arise from or be connected with such act or transaction.
3. Jurisdiction must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity, the relative convenience of the parties, the benefits and protection of the laws of the state and the basic equities of the situation.

Adopting this new definition of what constituted doing business, the court found that the activities of Kohn did not meet the minimal contacts requirement of part three, because his speech was an isolated act and as such was not a sufficient minimal contact to give jurisdiction to the state court.

The court also had before it the question of whether the defendant, by making a special appearance in the Mississippi courts and filing a motion to dismiss for lack of jurisdiction, had made a general appearance under the statute[49] with the resulting waiver of the right to raise the question of jurisdiction. Read literally, the statute indicates that any motion to quash process constitutes a general appearance, and *York v. Texas*[50] held constitutional a Texas statute which denied a nonresident the right to make a special appearance in the Texas courts to contest the state courts' jurisdiction. Distinguishing those decisions the court found not to be in point, (either because the defendant had voluntarily entered an appearance or was doing business in the state)[51] and modifying and overruling other cases[52] to the extent that they were not distinguishable on facts and issues, the court held that a nonresident defendant could make a special appearance in the courts of Mississippi to raise the issue of whether the state court had jurisdiction without subjecting himself to its jurisdiction. Thus, a special appearance may be made by a motion to dismiss or any other pleading specifically raising this issue before a general appearance is made, and any such motion to the jurisdiction should be heard and determined before any other pleading is filed by the defendant.

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[49] MISS. CODE ANN. § 1881 (1956).

[50] 137 U.S. 15 (1890).

[51] *E.g.*, Arndt v. Turner, 230 Miss. 294, 92 So. 2d 875 (1957).

[52] Gridley, Maxon and Co. v. Turner, 179 Miss. 890, 176 Miss. 733, 177 So. 362 (1937); Standard Oil Co. of Ky. v. State, 107 Miss. 377, 65 So. 468 (1914).

This landmark decision had two significant effects: (1) it laid down a new test in Mississippi for determining what constituted doing business, and (2) it made clear that a nonresident could make a special appearance to test the jurisdiction of the state courts without making a general appearance. Obviously, *Mladinich* liberalized the doing business concept, and its rule was a far cry from the old fictions of presence and consent. Nevertheless, the minimal contacts still had to be more than one might think from a literal interpretation of the word "minimal" and certainly more than had been found sufficient twenty years earlier by the United States Supreme Court.

II. The Amended Long Arm Statute

In 1964, obviously prompted by the decision rendered in *McGee v. International Life Insurance Co.*[53] and following the lead taken by other states,[54] the Mississippi legislature amended the terms of section 1437 of the Mississippi Code so as to broaden its scope[55] and enlarge the jurisdiction of the courts of this state over nonresident defendants.[56] The provisions of the amended statute now read in part as follows:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this State as to doing business herein, who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State, or who shall commit a tort in whole or in part in this State against a resident of this State, or who shall do any business or perform any character of work or service in this State, shall by such act or acts be deemed to be doing business in Mississippi. . . .[57]

As previously discussed, prior to the 1964 amendment jurisdiction over nonresident defendants could be asserted only if the nonresident conducted business activities within this state of a sufficient nature to be classified as "doing business" here. As is readily apparent from the decisions rendered under the original statute, a rather substantial and continuous amount of activity was necessary in order to bring one within the ambit of the term "doing business." While the original statute was clearly a step in the right direction, its application left much to be desired since residents had no practical recourse against the transient wrongdoer whose activities within the state were insufficient to constitute "doing business" herein. This problem was squarely met by the legislature in the amended statute by also providing for the assertion of jurisdiction, within certain limitations, over nonresidents whose sole contact with this state is the commission of a single tort or the execution of a single contract. Thus, under the terms of the amended long arm statute there are now three distinct categories of nonresidents who are subject to service of process:

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[53] 355 U.S. 220 (1957).

[54] *See* Dahlberg Co. v. Western Hearing Aid Center, 259 Minn. 330, 107 N.W.2d 381, 384 (1961). For a complete discussion of the development of the single act statutes, *see* Annot., 23 A.L.R.3d 551 (1969) (single contract statutes) and Annot., 24 A.L.R.3d 532 (1969) (single tort statutes).

[55] Mladinich v. Kohn, 186 So. 2d 481, 482 (Miss. 1966).

[56] Smith v. Temco, 252 So. 2d 212, 215 (Miss. 1971).

[57] Miss. Code Ann. § 1437 (Supp. 1971).

1. Those who have executed a contract with a resident of Mississippi to be performed in whole or in part within this state;
2. Those who have committed a tort, in whole or in part, in Mississippi against a resident of this state; and
3. Those who perform any nature of work or services in this state.[58]

The statute further provides that when the nonresident defendant's activities are sufficient to place him in one or more of the three categories set out above, he is deemed to be "doing business" in this state, and his act or acts are deemed equivalent to the appointment of the Secretary of State of Mississippi as his agent for service of process. Service upon the Secretary of State has the same legal effect as if such nonresident had been personally served with process at his principal place of business, according to the laws in effect at such location.[59]

It should be noted that the statute may be used to assert jurisdiction over nonresidents only.[60] Conversely, only residents of this state may utilize the statute to secure jurisdiction over a nonresident.[61] Foreign corporations properly qualified to do business in Mississippi are treated as residents for purposes of the statute.[62]

A word of caution is in order. Although the terms of the Mississippi long arm statute are extremely broad, it must be recognized that its reach is not completely unbridled, and because of constitutional considerations its application is limited. The statute specifically provides that even in instances when a nonresident has taken action within this state which will place him in one or more of the three categories defined therein, he may not be subjected to service of process unless the suit is one that arises out of or is connected with the specific act or acts which have placed him in the category in question. This portion of section 1437 provides:

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[58] C. H. Leavell & Co. v. Doster, 211 So. 2d 813, 814 (Miss. 1968).

[59] Miss. Code Ann. § 1437 (Supp. 1971).

[60] Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193, 1201 (S.D. Miss. 1969).

[61] C. H. Leavell & Co. v. Doster, 211 So. 2d at 814 (Miss. 1968). *Compare* Ewing v. Lockheed Aircraft Corp., 202 F. Supp. 216, 219 (Minn. 1962), wherein it was held that the Minnesota Long Arm Statute, Minn. Stat. Ann. § 313.13, subd. 1 (3) (1961) could be utilized by residents and nonresidents alike.

[62] C. H. Leavell & Co. v. Doster, 211 So. 2d at 814 (Miss. 1968).

> Such act or acts shall be deemed equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served *in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee. . . .*[63] (emphasis added.)

For example, A is a resident of Tennessee and does a large volume of business in Mississippi with B, a resident of Mississippi. A's business activities in Mississippi are sufficient to classify him as "doing business" here. A and B execute a contract in Tennessee which is completely unrelated to A's business activities in Mississippi, and no portion of this contract is to be performed in Mississippi. A then breaches his obligations under said contract and B institutes suit in Mississippi against A seeking to recover damages for breach of contract. B seeks to effectuate service of process under section 1437, alleging that A is subject to service of process by virtue of the fact that he is doing business here. A appears specially and moves to quash process. Although A is "doing business" in Mississippi, subjecting himself to service of process under section 1437 in any suit connected with or arising out of such business activities, he is not amenable to service of process under the statute in a suit which is unrelated to such business activities. Thus, if B wishes to pursue his cause of action against A, he will be forced to seek recourse in the courts of Tennessee.[64]

The inclusion of this requirement in section 1437 was due in part to the decision of the United States Supreme Court in *Hanson v.*

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[63] MISS. CODE ANN. § 1437 (Supp. 1971).

[64] *See* Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193, 1206 (S.D. Miss. 1969); Easterling v. Volkswagen of America, Inc., 308 F. Supp. 966, 981 (S.D. Miss. 1969); Collins v. Truck Equipment Sales, Inc., 231 So. 2d 187, 188 (Miss. 1970). *See also,* Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act; A New Sole For International Shoe,* 47 GEO. L.J. 342, 354 (1958) [hereinafter cited as *A New Sole For International Shoe*].

Denckla,[65] which held that when assertion of jurisdiction over a nonresident is based on activity of the nonresident within the forum state, the cause of action must be one which arises out of the activity in question.[66] In an extremely well written article dealing with this topic, one writer has commented on the necessity of the rule as follows:

> The omission of this rule would be a violation of the reasonableness which American jurisprudence has always demanded of due process. The right of a state to protect its citizens from the operations of nonresidents is a natural but not an unlimited one. . . .[67]

With this restriction firmly in mind, a review of each of the three categories of nonresidents who are subject to service of process under section 1437 is now in order.

A. The Single Contract Provision

The first category of nonresidents subject to service of process under the terms of Mississippi's long arm statute is those ". . . who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State. . . ."[68] For convenience this statutory category will hereinafter be referred to simply as the "single contract" provision.

Assertion of jurisdiction based upon the performance of a single contract is clearly a departure from traditional notions held by the courts of this state as to the minimum contacts which were necessary in order to satisfy due process requirements under the decision of *International Shoe Co. v. Washington*.[69] Prior to the 1964 amendment to section 1437, the Mississippi court had pronounced that a single isolated act was not sufficient contact with this state for assertion of jurisdiction[70] and had, in fact, required a substantial and continuous amount of activity within the state before it would subject a nonresident to trial here against his wishes.[71] The fact that the single contract provision of section 1437 has gone virtually unnoticed since its addition in 1964[72] is difficult to understand, but it may represent a reluctance on the part of the bench and bar to change their convictions in this regard.

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[65] 357 U.S. 235 (1958).

[66] *Id.* at 251. *Cf.* Simon v. Southern Ry., 236 U.S. 115, 130 (1915); Old Wayne Mut. Life Ass'n. v. McDonough, 204 U.S. 8, 22-23 (1907).

[67] Note, *A New Sole For International Shoe*, *supra* note 64, at 354.

[68] MISS. CODE ANN. § 1437 (Supp. 1971).

[69] 326 U.S. 310 (1945).

[70] *See* Mladinich v. Kohn, 250 Miss. 138, 164 So. 2d 785, 790 (1964). *But see*, Comment, *In Personam Jurisdiction Over Nonresidents*, *supra* note 13, at 102, which noted the possibility that § 1437, prior to its amendment in 1964, was broad enough for assertion of jurisdiction based on a single transaction.

In any event, although Mississippi courts have been hesitant to assert jurisdiction on the basis of the performance of a single contract, it is obvious under the decision of *McGee v. International Life Insurance Co.*[73] that such action does not violate federal constitutional guarantees of due process. In *McGee* the Supreme Court upheld a California statute[74] which permitted service of process over nonresident insurance companies in suits arising out of insurance policies solicited by the company through the mail. It would appear that the defendant insurance company's contacts with the forum were at the barest of minimums in *McGee*, since the company had never transacted any business in California other than solicitation and delivery by mail of the policy which was the subject of the controversy. Upholding jurisdiction, Mr. Justice Black commented:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.
> Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . .[75]

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[71] *See, e.g.,* Livestock Services, Inc. v. American Cyanamid Co., 244 Miss. 531, 142 So. 2d 210 (1962); J. R. Watkins Co. v. Flynt, 220 Miss. 871, 72 So. 2d 195 (1954); Lee v. Memphis Publishing Co., 195 Miss. 264, 14 So. 2d 351 (1943); North American Mortgage Co. v. Hudson, 176 Miss. 266, 168 So. 79 (1936).

[72] *See* C. H. Leavell & Co. v. Doster, 211 So. 2d 813 (Miss. 1968), wherein jurisdiction was apparently asserted over a foreign corporation at least partially on the basis of its performance of a single contract within this state.

[73] 355 U.S. 220 (1957).

[74] CALIF. INS. CODE §§ 1610-20 (West 1955).

[75] 335 U.S. at 222, 223. *See also,* Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963), wherein the court stated that:

In many instances constitutional problems connected with assertion of jurisdiction on this basis are minimized by the physical presence of the nonresident within the forum state in the performance of his obligations under the contract in question.

In fact, performance of the contract upon which jurisdiction is to be asserted will often guarantee a sufficient amount of activity within the state so that the defendant may be considered to be "doing business" therein under the third category of section 1437, thus providing a dual basis upon which jurisdiction may be predicated. In *C. H. Leavell & Co. v. Doster*[76] suit was instituted by two nonresident corporations qualified to do business in Mississippi against a third corporation which was not qualified to do business here. The suit arose out of a contract entered into by the parties and performed by the defendant within the state. The court sustained jurisdiction under the single contract provision of section 1437 but further held that by having performed work and services under the contract in question, the defendant was also subject to the jurisdiction of the courts of Mississippi under the third category.[77]

In order to properly understand the single contract provision and its operation, it is necessary to briefly review the terminology used therein. In view of the limited application which this portion of the statute has received in Mississippi, recourse must be had to decisions from other states with similar statutes. However, it is not the purpose of this discussion to present an in depth review of decisions from other states whose long arm statutes contain a single contract provision similar to that found in section 1437.[78] Other cases are discussed solely to illustrate what is possible under a single contract provision such as that found in the Mississippi long arm statute.

Naturally the first question which arises in analyzing this portion of section 1437 is the meaning of the word "contract" as used therein.

It is impossible to imagine a case arising from a contract made by a foreign corporation "with a resident of Vermont to be performed in whole or in part by either party in Vermont" where contacts with Vermont would not suffice to sustain jurisdiction. The statute merely characterizes the extent of contacts with the forum state actually present in McGee. While Hanson affirms the necessity of a defendant's having such "minimal contacts" with the forum state, that case in no sense can be taken as increasing the requirements which the Court found to be satisfied in McGee. *Id.* at 128.

[76] 211 So. 2d 813 (Miss. 1968).

[77] *Id.* at 815.

[78] *See* Annot., 23 A.L.R.2d 551 (1969) for a comprehensive review of the single contract provisions of long arm statutes from other jurisdictions.

Obviously written contracts come within the meaning of the term.[79] Although the question has not been resolved in this state, courts in other jurisdictions have also held that oral contracts come within the statutory meaning. In *Bonhiver v. Louisiana Brokers Exchange, Inc.,*[80] and in *United Barge Co. v. Logan Charter Service, Inc.,*[81] service of process over nonresidents was upheld under the single contract provision of the Minnesota long arm statute[82] based on the performance of an oral contract. In *State v. Knapp*[83] the Supreme Court of West Virginia indicated that jurisdiction under the single contract provision of the West Virginia long arm statute[84] on the basis of an oral contract which supplemented an earlier written contract was proper. Inclusion of an oral agreement within the term "contract" would seem to be logical since both written and oral contracts are express in nature.[85] The ultimate question is whether the statutory term "contract" is broad enough to include implied contracts. Unfortunately no case has been found which specifically reaches this question, although it seems probable that it will arise in the future.

The next consideration in defining the probable reach of this portion of section 1437 is to determine the significance of the fact that the statute provides for assertion of jurisdiction when the contract is performed "in whole or in part by any party within this State." The utilization of this terminology is thought by many to represent the ultimate expansion of the reach of a single contract provision of a long arm statute. This terminology was the subject of comment in *Midwest Packaging Corp. v. Oerlikon Plastics, Ltd.,*[86] wherein the single contract provision of the Iowa long arm statute[87] was construed:

> The kinds of contractual activities giving rise to causes of action over which jurisdiction is asserted over nonresident defendants vary from state to state. Although a state need not provide its courts with jurisdiction over every action which constitutionally could be brought in the state . . . statutes which define the requisite activity for jurisdiction as a contract with a resident "to be performed in whole or in part by either party" within the state . . . are among the most liberal. . . .[88]

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[79] 1 A. CORBIN, CONTRACTS § 3 (1963).

[80] 255 F. Supp. 254 (Minn. 1966).

[81] 237 F. Supp. 624 (Minn. 1964).

[82] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

[83] 147 W.Va. 704, 131 S.E.2d 81 (1963).

[84] W.VA. CODE, Chap. 31, Art. 1, § 71 (1961).

[85] 1 A. CORBIN, CONTRACTS § 18 (1963).

[86] 279 F. Supp. 816 (S.D. Iowa 1968).

[87] IOWA CODE § 617.3 (1971).

[88] 279 F. Supp. at 818.

There would seem to be little, if any, problem in determining when a contract is performed "in whole" within a state, since this term is somewhat self-explanatory. However, it is more difficult to determine exactly what the statute means when it refers to contracts performed "in part" in Mississippi. Naturally a contract is performed "in part" within a state when some portion of the activity contemplated by the terms thereof takes place within the forum state. However, the key question is the amount of activity which must take place within the forum before jurisdiction can properly be asserted consonant with requirements of due process. Certainly when the nonresident's activity within the forum in performing the contract under consideration is equal to or in excess of that found in *McGee,* the basic requirements of due process have been met. As will be recalled, in *McGee* the only activity of the defendant in the forum was the use of the mails in connection with the solicitation and issuance of a policy of insurance. However, although individual states must remain within the liberal boundaries set by *McGee,* they are in no wise obliged to exercise jurisdiction to the fullest possible extent.[89] It is submitted that the problem of the degree of performance which must take place within a state before the minimum contacts requirement has been satisfied is one for which no hard and fast rule can be devised. As in other cases decided under section 1437, the decision of whether or not jurisdiction can properly be asserted on this basis should turn on the facts which exist in each particular case.[90] Since no ready answer is available for this problem, a review of the extent to which other states have seen fit to exercise jurisdiction based on the partial performance of a contract within the forum is in order. For purposes of this discussion, cases decided under the Minnesota long arm statute[91] have been utilized primarily because that statute is similar to section 1437 and has received a liberal construction,[92] thus providing an indication of the outer limits of a statute of this nature.

In *Lundell v. Massey-Ferguson Services N.V.,*[93] suit was instituted by Lundell, a citizen of Iowa, against the defendant, a foreign corporation not qualified to do business in Iowa, to recover the balance due under a written installment contract whereby the plaintiff sold to defendant all of his interest in certain inventions of and patent rights to hay and forage watering machines. Service of process was attempted under the single contract provision of the Iowa long arm statute, which provides for assertion of jurisdiction over nonresident corporations not qualified to do business in Iowa in part as follows:

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[89] *See* Walker v. Savell, 335 F.2d 536 (5th Cir. 1964); 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 179 (Wright ed. Supp. 1968).

[90] *Cf.* Republic-Transcon Indus., Inc. v. Templeton, 253 Miss. 132, 175 So. 2d 185 (1965).

[91] MINN. STAT. ANN. § 303.13, subd. 1(3) (1961).

[92] Guardian Packaging Corp. v. Kapak Indus., Inc., 316 F. Supp. 952, 954 (Minn. 1970); Haldeman-Homme Mfg. Co. v. Texacon Indus., Inc., 236 F. Supp. 99, 101 (Minn. 1964).

[93] 277 F. Supp. 940 (N.D. Iowa 1967).

> "If a foreign corporation makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa . . . such act shall be deemed to be doing business in Iowa . . . for the purposes of service of process . . . on such foreign corporation under this section. . . ."[94]

Upholding jurisdiction, the court noted that the contract called for payments of installments by the defendant to the plaintiff in Iowa, that two such payments had been made in this manner, and that the employees of the defendant had called on the plaintiff on at least three occasions for consultation as to the technical aspects of the invention in question. The court commented:

> It is this court's opinion that if faced with the facts of this case, the Iowa Supreme Court, in view of its liberal attitude concerning jurisdiction of foreign corporations as expressed in Tice v. Wilmington Chem. Corp., 141 N.W.2d 616 (Iowa 1966), would hold Sec. 617.3 applicable.
>
> Determination of what minimum contacts due process requires is a question of federal law. . . . In a contact action, the due process objection is overcome if the contract has a substantial connection with the state claiming jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). See also Hanson v. Denckla, 357 U.S. 235, 251-52, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).
>
> It is this court's view that the contracts noted above provide a substantial connection with the state of Iowa, and therefore defendant's Motion to Dismiss is not well taken.[95]

In *Kornfuehrer v. Philadelphia Bindery, Inc.*[96] suit was instituted by a resident of Minnesota against a Pennsylvania corporation not qualified to do business in the state when the latter failed to comply with the terms of a sales agreement entered into by the parties. Service of process had been effectuated pursuant to the Minnesota long arm statute,[97] and the defendant promptly moved to quash. The decision rendered by the court reveals that the contract in question had been negotiated and consummated primarily by means of the mail. The product to be sold under said contract was manufactured by the defendant outside the state of Minnesota and under the terms of the agreement was to be shipped to the buyer from Philadelphia f.o.b. Acceptance of and payment for said goods was to take place in Minnesota. Apparently the only contact which the defendant had with the state of Minnesota was the fact that it had entered into a contract by mail to sell goods to a resident of Minnesota. Holding that the assertion of jurisdiction was proper, the court noted the similarities between the facts in the case then before it and in *McGee,* i.e., deliverance of the contract within the forum by the defendant (thus indicating that the nonresident was aware of the fact that it was transacting business therein), payments to the nonresident mailed from within the forum, and residence of the plaintiff within the forum at the time the contract was breached. The court was of the opinion that, as in *McGee,* these factors provided a sufficient contact with the forum. The opinion states:

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[94] IOWA CODE § 617.3 (1971).

[95] 277 F. Supp. at 941, 942.

[96] 240 F. Supp. 157 (Minn. 1965).

[97] MINN. STAT. § 303.13, subd. 1(3) (1961).

> The legal issues in McGee were so similar to those raised here that a close examination of the factors which the Court thought gave the contract a substantial connection with California seems appropriate. There are only three.
>
> 1. The contract was delivered in the forum State. . . .
> 2. Payment was made from the forum State. . . .
> 3. The plaintiff was a resident of the forum State at the time the contract was breached. . . .
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> . . . .
>
> Thus, this Court has concluded that the fact that the Bindery had entered a contract with a Minnesota resident to supply the resident with its product in the normal course of its profit-making activities was sufficient contact with Minnesota to allow the State to exercise personal jurisdiction for causes of action arising out of the contract. . . .[98]

In *Washington Scientific Industries, Inc. v. American Safeguard Corp.,*[99] the plaintiff, a Minnesota corporation, had entered into a contract with the defendant, a nonresident corporation not qualified to do business in Minnesota, whereby the latter corporation was to act as the exclusive sales representative of the former in an area outside Minnesota. Difficulties arose between the plaintiff and the defendant over commissions due under the terms of this contract, and a declaratory judgment action was instituted by the plaintiff in federal district court of Minnesota. Service of process was effectuated over the corporate defendant pursuant to the single contract provision of the Minnesota long arm statute,[100] and since the defendant's contacts with the forum state were relatively minimal, a motion to dismiss for lack of jurisdiction was made. Overruling the motion, the court noted the following factors as evidence of partial performance of the contract within Minnesota: The president of the defendant corporation had originally traveled to Minnesota in order to solicit the plaintiff to enter into the contract in question, and thereafter he had returned to Minnesota on two occasions for training sessions. All checks payable to the defendant for services rendered were to be issued by the plaintiff in Minnesota; all directives, correspondence and shipment of materials would originate with the plaintiff in that state. The court commented as follows on these activities:

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[98] 240 F. Supp. at 160-61.

[99] 308 F. Supp. 736 (Minn. 1970).

> The court is quite clear that this is sufficient contact with the State of Minnesota to enable the plaintiff to invoke jurisdiction through the long-arm statute. Obviously at least plaintiff's portion of the contract would be performed within Minnesota not only in writing checks in payment of defendant's services, but in addition issuing directions, carrying on correspondence, making shipments, etc. Jurisdiction under this long-arm statute has been maintained in cases where the activity within Minnesota is not greater than here. Hagberg v. Colonial & Pacific Frigidways, Inc., 279 Minn. 396, 157 N.W.2d 33 (1968); Dahlberg Co. v. Western Hearing Aid Center, 259 Minn. 330, 107 N.W.2d 381, cert. denied, 366 U.S. 961, 81 S.Ct. 1921, 6 L.Ed.2d 1253 (1961). See Washington Scientific Indus., Inc. v. Polan Indus., Inc., 273 F. Supp. 344 (D. Minn. 1967).[101]

In *Dahlberg Co. v. Western Hearing Aid Center*[102] suit was instituted in state court of Minnesota by the plaintiff, a Minnesota corporation, against three inter-related Oregon corporations not qualified to do business in Minnesota to recover on certain promissory notes executed by the defendants in favor of the plaintiff and on an open account maintained by one of the defendants. The plaintiff was a manufacturer of hearing aids, which were distributed outside the state by the defendants pursuant to a written contract between the parties. Service of process was made on defendants under the Minnesota long arm statute,[103] and defendants' motion to quash was dismissed. On appeal to the Supreme Court of Minnesota, jurisdiction was upheld based upon the following activities performed in furtherance of the distributors' contract between the parties: The original distributorship agreement was executed in Minnesota as were the promissory notes which were the subject of the lawsuit; goods were shipped by the plaintiff from Minneapolis f.o.b. to the defendant; the president of the defendant corporation attended sales meetings held by the plaintiff in Minnesota; the defendant furnished the plaintiffs with sales reports, lists of customers, receipts of payments for products sold, etc., which were mailed to Minnesota.

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[100] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

[101] 308 F. Supp. at 738.

[102] 259 Minn. 330, 107 N.W.2d 381 (1961).

[103] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

In view of the fact that the single contract provision of Mississippi's long arm statute[104] is equally as broad as that of Minnesota,[105] it is obvious that the provision has great potential. Whether our court will choose to give a broad interpretation to the single contract provision of the Mississippi statute is a question which remains to be answered. However, in view of the attitude taken by the Mississippi Supreme Court with reference to the single tort provision of section 1437, it would appear that a more liberal attitude may be developing toward full utilization of the statute.[106]

The final aspect of this portion of the statute which must be considered is the fact that the legislature has apparently provided for assertion of jurisdiction on the basis of a single contract between a resident and a nonresident when no overt action is taken by the nonresident within the forum. Although section 1437 provides that the nonresident must have executed with a resident, a contract to be performed at least in part within this state, the statute further provides that performance within the state may be "by any party." This wording appears to contemplate assertion of jurisdiction when a nonresident enters into a contract with a resident, but performance of the contract within the state is carried out solely by the resident. It is obvious that this provision creates a problem insofar as due process requirements are concerned, since the Supreme Court held in *Hanson v. Denckla* that ". . . unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."[107]

At first glance it appears that *McGee v. International Life Insurance Co.* provides a solution to this problem, since in that case jurisdiction was upheld even though the defendant was never physically present within the forum. However, this conclusion is unfounded, since it was apparently determined in that decision that the defendant acted within the forum by use of the mail to solicit the contract in question and to deliver the insurance contract to the resident.[108]

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[104] MISS. CODE ANN. § 1437 (Supp. 1971).

[105] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

[106] *Cf.* Smith v. Temco, 252 So. 2d 212 (Miss. 1971).

[107] 357 U.S. at 253.

Reviewing cases from other states with statutes construing a single contract provision similar to section 1437, no case in which jurisdiction was upheld when no portion of the contract was performed by the nonresident within the forum was found. However, even though the nonresident was never physically within the state, courts of other states have determined that there was performance within the forum by defendant based on his use of the mail, interstate telephone conversations, etc. Again, cases decided under the Minnesota long arm statute[109] have been utilized to provide an indication of the outer limits of a statute of this nature.

In *Haldeman-Homme Mfg. Co. v. Texacon Industries, Inc.,*[110] suit was instituted in federal district court by Haldeman-Homme, a Minnesota corporation, against Texacon, a nonresident corporation not qualified to do business in Minnesota, for false representation and breach of contract. Service of process was attempted over Texacon under section 303.13, subd. 1 (3) (1961),[111] which provides for assertion of jurisdiction over nonresident corporations who have entered into ". . . a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota. . . ." None of the defendant's agents or employees had ever entered the state in negotiating the contract in question, nor had such nonresident corporation performed any portion of said contract within Minnesota. Texacon moved to quash process, urging that assumption of jurisdiction was unconstitutional under the rule laid down in *Hanson v. Denckla,*[112] which requires " '. . . some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws'."[113] Texacon argued that since ". . . none of its agents . . . ever entered Minnesota . . . that there has never been any 'act' by which it invoked the protection of the laws of Minnesota."[114] Rejecting the position taken by Texacon, the court noted that the requirements of *Hanson v. Denckla* were satisfied by the fact that subsequent to the consummation of the contract, Haldeman-Homme had executed a promissory note and chattel mortgage in Minnesota and forwarded these documents to the defendant in Texas, where they were accepted. Both of these documents would normally have been enforceable only in Minnesota since the maker of the note and the property subject to the chattel mortgage were found there. The court expressed the view that acceptance of these documents by the defendant was evidence of an act on the part of said defendant seeking the protection of the laws of Minnesota, thus satisfying the requirements of *Denckla.*

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[108] *See* Note, *A New Sole For International Shoe, supra* note 64, at 352. *See also* Travelers Health Ass'n. v. Virginia, 339 U.S. 643 (1950).

[109] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

[110] 236 F. Supp. 99 (Minn. 1964).

[111] MINN. STAT. ANN. (1961).

[112] 357 U.S. 235 (1958).

[113] 236 F. Supp. at 101.

[114] *Id.*

Paulos v. Best Securities, Inc.[115] was a suit instituted by a Minnesota resident against a New York corporation not qualified to do business in Minnesota and certain of the officers and agents of said corporation to recover for the sale of securities by said defendants in violation of state law. The sales in question had originally been solicited by mail; none of the defendants had ever been physically present within the state; and all sales were consummated primarily by long distance telephone and to a lesser degree by use of the mail. Upholding jurisdiction over the nonresident corporation, the Supreme Court of Minnesota commented as follows on service of process under the single contract provision of the Minnesota long arm statute:[116]

> 4. Insofar as Best Securities is concerned, it may be said that under section 303.13, subd. 1 (3), above quoted, its actions as above described constituted "doing business" in Minnesota. This section provides that a foreign corporation shall be deemed as "doing business" here if it enters into a contract with a resident, which contract is to be performed in whole or in part within the state. *Obviously, the acts of Best Securities in promoting and consummating a series of stock sales to plaintiff in Minnesota, through repeated long distance telephone and mail communications, would fall within this definition. Certainly plaintiff's payments for such shares and their ultimate delivery to him were acts, some part of which at least were to be performed in Minnesota.* Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670; Schilling v. Roux Distributing Co., Inc., 240 Minn. 71, 59 N.W.2d 907. It would follow that under Section 303.13, subd. 1 (3), such actions were sufficient to give the Minnesota court jurisdiction of Best Securities as a foreign corporation doing business here.[117] (Emphasis added.)

On the other hand, jurisdiction has been declined in a number of instances because performance within the forum was solely by a resident plaintiff.

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[115] 260 Minn. 382, 109 N.W.2d 576 (1961).

[116] MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

[117] 109 N.W.2d at 582.

As set out previously, the wording used in the single contract provision of section 1437 is extremely broad and, as indicated by decisions from other states, can serve as a very useful tool for acquiring jurisdiction over nonresidents whose activity within the forum is neither systematic nor continuous. Since the provision has gone virtually unnoticed thus far, the manner in which it will be applied by the Mississippi Supreme Court is yet to be determined. However, in view of the more liberal trend taken by the Mississippi courts in recent decisions, there can be little doubt that the provision will receive increased recognition in the near future.

B. The Single Tort Provision

The second category of nonresidents subject to service of process under the terms of Mississippi's present long arm statute includes those who ". . . shall commit a tort in whole or in part in this State against a resident of this State. . . ."[118] For convenience this portion of the statute will be referred to as the "single tort" provision.

The obvious reason for the inclusion of this provision in the 1964 amendment to section 1437 was to insure that residents of this state had a basis for assertion of jurisdiction over nonresidents whose tortious action caused injury here, but whose contacts with Mississippi were insufficient to constitute "doing business" within the meaning of what is now category number three of the statute. A graphic example of the gap filled by this provision can be found in the case of *Mladinich v. Kohn,*[119] which was decided shortly after the enactment of the 1964 amendment but prior to the date on which it took effect.[120] In that case the defendant, a resident of Louisiana, entered this state and delivered a speech which allegedly slandered three Mississippi residents. However, he could not be subjected to suit here under the provisions of the old long arm statute since his single isolated foray into the state was insufficient to constitute "doing business" within the terms of the unamended provisions of the statute.[121] Thus, the plaintiffs were faced with the prospect of waiting until the defendant returned and could be personally served with process or following him to the state of his residence. The inequities of such a situation are apparent, since the cost of pursuing a transient tortfeasor to a forum where personal service can be effectuated will often prove to be prohibitive.[122] With the addition of the single tort provision, another of the gaps which existed in Mississippi's long arm statute was filled, and the in personam jurisdiction of Mississippi courts over nonresidents was significantly broadened.

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[118] Miss. Code Ann. § 1437 (Supp. 1971).

[119] 250 Miss. 138, 164 So. 2d 785 (1964).

[120] It should be noted that in a later decision the Mississippi Supreme Court stated that it assumed that had the amended provisions of section 1437 been in effect on the date on which the alleged tort occurred that jurisdiction could properly have been asserted. Mladinich v. Kohn, 186 So. 2d at 482.

[121] 164 So. 2d at 789-90.

Since this portion of the statute was apparently designed to provide a basis for assertion of jurisdiction when the nonresident's contacts with the forum are at a bare minimum, close scrutiny must be given to constitutional considerations. As set out previously, constitutional limitations absolutely require that when jurisdiction is asserted under any long arm statute the defendant have certain minimal contacts with the forum state.[123] Traditionally our courts have required a significant amount of activity within the forum in order to satisfy this minimal contact requirement.[124] In fact, it is generally conceded that the Mississippi Supreme Court has interpreted the due process requirements of the United States Constitution in a much more conservative manner than the United States Supreme Court.[125] Thus, assertion of jurisdiction based upon the commission of a single tort is a radical departure from the traditional concept fostered by the Mississippi judiciary as to the minimum contacts necessary in order to satisfy requirements for due process. In a sense the enactment of legislation of this nature and the resulting liberalization of traditional concepts of constitutional theory necessary to accommodate such laws can be seen as a realistic attempt by the legislative and judicial branches of the government to meet the changing needs of a rapidly expanding society. Discussing the single tort provision of the Iowa long arm statute,[126] the supreme court of that state commented in this regard in the case of *Andersen v. National Presto Industries, Inc.*:[127]

> There has now been a further significant trend toward the liberalization of the laws pertaining to obtaining jurisdiction over foreign corporations, and we think our decision in the case at bar represents the more logical interpretation of our statute in the light of present day conditions. Modern means of transportation and communication have greatly altered conditions since the decision in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed.

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[122] *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

[123] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[124] *See, e.g.,* Walker v. Savell, 335 F.2d 536, 543 (5th Cir. 1964).

[125] *See* Dawkins v. White Prod. Corp., 443 F.2d 589, 591 (5th Cir. 1971); Smith v. Barker, 306 F. Supp. 1173, 1175 (N.D. Miss. 1968); Walker v. Savell, 335 F.2d 536, 543 (5th Cir. 1964).

[126] IOWA CODE § 617.3 (1962).

[127] 257 Iowa 911, 135 N.W.2d 639 (1965).

> 565, and the power of a state to assert its jurisdiction over nonresidents has been greatly expanded. It is an example of the capacity of the law to grow and change with changing conditions. . . .[128]

In *Coulter v. Sears, Roebuck & Co.,*[129] the Fifth Circuit Court of Appeals noted:

> The reservoir of state jurisdictional power over nonresidents has swollen tremendously in recent years. The receding boundaries of due process reflect the fundamental change in the national economy since the days of Pennoyer v. Neff.[130]

Although the United States Supreme Court has yet to rule upon the constitutionality of assertion of jurisdiction based upon the commission of a single tort, the fact that *McGee v. International Life Insurance Co.*[131] cites with approval the case of *Smyth v. Twin State Improvement Co.*[132] (wherein the assertion of jurisdiction on this basis had been upheld by the Supreme Court of Vermont) may serve as an indication of the manner in which this question will eventually be answered.[133] There does seem to be a trend of judicial thought, at least in decisions rendered by the Fifth Circuit Court of Appeals, that the commission of a single tort by a nonresident within a state provides a sufficient contact between the nonresident and the forum to allow assertion of jurisdiction without an infringement of due process.[134] In *Eyerly Aircraft Co. v. Killian*[135] the court expressed its sentiments in this regard as follows:

> [W]here a nonresident corporation engages in a single isolated transaction in a state and a tort claim arises out of that activity, the state may assert jurisdiction over the nonresident corporation without contravening due process. . . .[136]

When the tort upon which jurisdiction is based is committed "in whole" within the forum (i.e., when the tortious act itself occurs within the forum)[137] there would seem to be a lesser problem from the constitutional standpoint, since the defendant will have taken overt action within the forum as required by *Hanson v. Denckla*.[138] However, there is a growing trend to assert jurisdiction in products liability cases when the defendant is never physically present within the forum but manufactures a product which causes injury therein on the theory that a tort occurs in part wherever the product in question causes injury.[139] Although the nonresident manufacturer has no direct contact with the forum, a number of courts have held that the presence of a defective product causing injury within the forum provides a sufficient contact with the nonresident so that jurisdiction can be asserted consonant with due process.[140] As one writer has observed:

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[128] *Id.* at 642.

[129] 426 F.2d 1315 (5th Cir. 1970).

[130] *Id.* at 1316, 1317.

[131] 355 U.S. 220, 223 (1957).

[132] 116 Vt. 569, 80 A.2d 664 (1951).

[133] *See also* the opinions of Justice Goldberg, acting as a single Judge in Rosenblatt v. American Cyanamid Co., 86 S.Ct. 1 (1965).

[134] Dawkins v. White Prod. Corp., 443 F.2d 589 (5th Cir. 1971); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Elkhart Eng'r. Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965).

[135] 414 F.2d 591 (5th Cir. 1969).

[136] *Id.* at 597.

> In all product liability cases, one contact with the forum always exists — the product itself. Thus, the question is presented whether this single factor is a sufficient foundation upon which to assert personal jurisdiction over the nonresident manufacturer in a suit arising from this contact. . . .
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> It would seem consonant with fairness to subject the manufacturer to jurisdiction whenever his product gave rise to the cause of action within the forum state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately determine his economic success. There can be no unfairness in forbidding the manufacturer to disassociate himself from his product. In sum, the manufacturer should be amenable to personal jurisdiction wherever the product causes injury, wherever he may consensually submit to jurisdiction, and wherever he may have purposefully established direct connections with the forum.[141]

The changing concept of what contacts must be present in order for proper assertion of jurisdiction was also discussed in *Gray v. American Radiator & Standard Sanitary Corp.*:[142]

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[137] *See* Bush v. Carpenter Bros., Inc., 447 F.2d 707 (5th Cir. 1971), and Alford v. Whitsel, 322 F. Supp. 358 (N.D. Miss. 1971).

[138] 357 U.S. 235 (1958).

[139] Smith v. Temco, 252 So. 2d 212 (Miss. 1971).

[140] *See* Note, *Jurisdiction In Personam Over Foreign Corporations In Products Liability Litigation,* 15 DEFENSE L.J. 336 (1966).

[141] *See* Note, *In Personam Jurisdiction Over Nonresident Manufacturers In Product Liability Actions,* 63 MICH. L. REV. 1028, 1031-32 (1965).

> As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.
>
> Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.[143]

Although a number of states have declined to follow this liberal trend, it seems clear that the Mississippi Supreme Court and the Fifth Circuit Court of Appeals have determined that assertion of jurisdiction over a nonresident based upon the commission of a tort either "in whole or in part" within the state against a resident does not violate guarantees of due process.[144] However, it should be kept in mind that although constitutional limitations have changed radically during the past several years, such limitations have not been discarded altogether. In *Coulter v. Sears, Roebuck & Co.*,[145] it was noted:

> The existence of the trend should not be interpreted to herald the "eventual demise of all restrictions on the personal jurisdiction of state courts." "The island of Tobago still may not impose its will upon the whole world." The due process clause continues to define the limits of state juridictional (sic) power over nonresidents.[146]

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[142] 22 Ill. App. 2d 432, 176 N.E.2d 761 (1961).

[143] *Id.* at 766.

[144] Bush v. Carpenter Bros., Inc., 447 F.2d 707 (5th Cir. 1971); Dawkins v. White Products Corp., 443 F.2d 589 (5th Cir. 1971); Alford v. Whitsel, 322 F. Supp. 358 (N.D. Miss. 1971); Smith v. Temco, 252 So. 2d 212 (Miss. 1971).

[145] 426 F.2d 1315 (5th Cir. 1970).

[146] *Id.* at 1317.

Having considered the constitutional aspects of this portion of section 1437, the next point of inquiry is its practical application. The initial recognition in Mississippi of the single tort provision of the statute is found in *Mladinich v. Kohn*,[147] which was twice before the Mississippi Supreme Court. In that case the defendant, a resident of Louisiana, was sued in three separate suits in the Circuit Court of Harrison County, Mississippi, for an allegedly slanderous speech which he had delivered within this state. Since he was no longer physically present within the state, service of process was attempted under section 1437 on the contention that the defendant was doing business here. All three suits were dismissed for lack of jurisdiction, and the action of the trial court was affirmed on appeal. Thereafter suit was reinstituted and service of process was attempted under the newly enacted single tort provision of section 1437, *supra*. Again the plaintiffs' cases were dismissed for lack of jurisdiction, and the second appeal was prosecuted to the Mississippi Supreme Court. On appeal the court determined that since the act upon which jurisdiction was asserted occurred prior to the date on which the amended provision of section 1437 became effective (July 1, 1964), the ruling of the trial court in dismissing for lack of jurisdiction had been proper. Although the court determined that the provisions of the amended statute would not be applied retroactively,[148] the court assumed that had the act upon which the plaintiffs sought to assert jurisdiction occurred after July 1, 1964, jurisdiction would have been proper, stating:

> Since it is not necessary to this decision, we assume without deciding that, if Kohn had committed the alleged slander in this state after the effective date of Chapter 320, it would suffice to give a Mississippi court in personam jurisdiction over him. . . .[149]

After gaining initial recognition in *Mladinich*, the single tort provision of section 1437 was to lie fallow for some seven years and was not upheld as a proper means for assertion of jurisdiction over a nonresident until 1971.[150] Although the wording of this portion of the statute is clear, there appeared to be judicial reluctance to accept the idea that a single transaction or act could provide a sufficient basis for assertion of jurisdiction.[151] In at least one case[152] the Mississippi Supreme Court declined to allow jurisdiction to be asserted over a nonresident defendant although the single tort provision of section 1437 could have warranted it. In *Collins v. Truck Equipment Sales, Inc.*[153] the plaintiff was the owner of a business which was destroyed by a truck owned by Hilbun Farms and driven by one of its employees. This truck contained a number of special modifications which had been installed by Truck Equipment Sales, Inc., an Alabama corporation not qualified to do business in this state. The plaintiff instituted suit against Truck Equipment Sales, Inc. in the Circuit Court of Jones County, Mississippi, alleging that the defective workmanship of the defendant on the truck in question had contributed to the accident in which his property was destroyed. Service of process was effectuated under section 1437, and the defendant entered its appearance solely for the purpose of challenging jurisdiction. Although the defendant had transacted some business within the state, the work done on the truck in question had taken place in Alabama. This case appears to have presented a perfect opportunity for application of the single tort provision of section 1437 under the theory that a tort was committed "in part" within Mississippi (i.e., a defective product causing injury within the state); however, the Mississippi Supreme Court held that the lower court had properly refused to assert jurisdiction since the plaintiff ". . . did not establish any causal relationship between the negligence alleged and the activities of the defendant within the forum state."[154]

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[147] 250 Miss. 138, 164 So. 2d 785 (1964); 186 So. 2d 481 (Miss. 1966).

[148] It should be noted that subsequent to the second Mladinich decision section 1437 was amended to provide for retroactive application. MISS. CODE ANN. § 1437 (c) (Supp. 1971).

[149] 186 So. 2d at 482.

[150] Cases cited note 144, *supra*.

The reluctance of the Mississippi Supreme Court to approve utilization of the single tort provision of section 1437 is also reflected in the decisions rendered by the federal judiciary. In *Smith v. Barker*[155] the plaintiff, a resident of Mississippi, brought a suit in a state court against Portable Elevator Manufacturing Company, an Illinois corporation not qualified to do business in this state, and Barker, a resident of the state of Tennessee, for injuries received when struck by an allegedly defective grain elevator, manufactured by Portable Elevator and sold to the plaintiff by Barker. Service of process had been effectuated on both the defendants by means of section 1437, and once the case had been removed to federal court, both defendants moved to dismiss for lack of personal jurisdiction. The court overruled Barker's motion, since it determined that his contacts with the forum were systematic and continuous, but refused to assert jurisdiction over Portable Elevator, since its only contact with Mississippi was the presence of a defectively manufactured product. In declining jurisdiction, the court stated:

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[151] *See* the dissenting opinion in Roberts v. Worthern Bank & Trust Co., 183 So. 2d 811, 817 (1966), involving the interpretation of the Arkansas Long Arm Statute, ARK. STAT. ANN. §§ 27-2501 to 2507 (Supp. 1963) (which the majority classified as much broader than section 1437) wherein it was stated that ". . . a single transaction is insufficient to subject a nonresident individual to the personal jurisdiction of the state where the transaction took place. . . ."

[152] Collins v. Truck Equip. Sales, Inc., 231 So. 2d 187 (Miss. 1970). *See also* Breckenridge v. Time, Inc., 253 Miss. 835, 179 So. 2d 781 (1965), wherein the court pretermitted the question of whether jurisdiction could be asserted under the single tort provision of section 1437.

[153] 231 So. 2d 187 (Miss. 1970).

[154] *Id.* at 188.

[155] 306 F. Supp. 1173 (N.D. Miss. 1968).

> Notwithstanding that in 1964, an amendment was added to section 1437 which, applied literally, would appear to have broadened its scope, the Mississippi Court has continued to interpret the Long-arm Statute restrictively. . . .
>
> Thus, although the Supreme Court of the United States has ruled in recent years that the states may constitutionally extend their jurisdiction over nonresidents to an extent greater than that permitted by the State Supreme Court, (McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957)), we are bound by the construction placed upon section 1437 by the state's highest tribunal, and we determine that the Mississippi Court would, if confronted with the facts presented here, hold jurisdiction lacking as to Portable Elevator. . . .[156]

In *Neal v. Trim-Master Corp.*[157] the defendant, Trim-Master Corporation, a foreign corporation not qualified to do business in Mississippi, manufactured a machine which was installed in a plant where the plaintiff was employed. The plaintiff was injured while working with this machine and brought suit against Trim-Master, alleging negligence in the design of the machine in question. Service of process was attempted under section 1437, and Trim-Master removed the case to federal court and moved to dismiss for lack of jurisdiction. In its decision sustaining the defendant's motion, the court isolated the issue before it as follows:

> The sole issue presented here is whether the Mississippi "Long-arm Statute", Miss. Code Ann. Sec. 1437 (a) (1942 Recomp.), subjects to in personam jurisdiction of local courts a nonresident corporation whose only contact with the forum state is the presence within its territorial boundaries of a product manufactured elsewhere by it which has allegedly caused injury in Mississippi to a resident of that state.[158]

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[156] *Id.* at 1175, 1176.

[157] 48 F.R.D. 390 (N.D. Miss. 1969).

[158] *Id.* at 390.

The court then discussed the basis for its decision as is set out below:

> Thus, as the Mississippi Court has interpreted the amended statute as requiring more than a sporadic or isolated activity unaccompanied by continuing action of the corporation within the state, we are constrained to hold, as a matter of state law, that personal jurisdiction over the defendant Trim-Master may not be maintained. Although it markets its products throughout the United States, it is not shown to have any property, office, bank account, warehouse, inventory, telephone listing, or agent of any kind in Mississippi. . . .[159]

Until recently, those favoring a more liberal interpretation may have felt that Mississippi's long arm statute had suffered a permanent judicial amputation.[160]

However, in February of 1971 the Federal District Court for the Northern District of Mississippi handed down the decision of *Alford v. Whitsell*,[161] which at last recognized the validity of the single tort provision of section 1437. In that case suit was instituted by the plaintiff, a resident of this state, in federal district court, seeking to recover damages for malicious prosecution from the defendant, who was a resident of Missouri. The plaintiff's case was based on the allegation that the defendant had willfully appeared before a Mississippi grand jury and by withholding the true facts from said grand jury, had prevailed upon them to return a criminal indictment against the plaintiff for false pretenses. Service of process was effectuated under section 1437, and the defendant moved to dismiss for lack of jurisdiction. This motion was overruled on the basis that the defendant was amenable to service of process under section 1437, since he had allegedly committed a tort within this state against a resident. The court commented:

> The Supreme Court of Mississippi has not defined a rule pertaining to state jurisdiction over a single, isolated tort committed within the state. *Mladinich I, supra.* This diversity court sits as a state court in this action and must decide the issue as the court believes the Mississippi Supreme Court would decide it.
>
> The "Long Arm" statute is plain and unambiguous. The statute states in clear language that a nonresident person who commits a tort in whole or in part in this state against a resident of this state, shall by such act be deemed to be doing business in Mississippi, thereby designating the Secretary of State as his process agent.

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[159] *Id.* at 392.

[160] *See* Casano v. WDSU-TV, Inc., 313 F. Supp. 1130, 1137 (S.D. Miss. 1970).

[161] 322 F. Supp. 358 (N.D. Miss. 1971).

> It is abundantly clear that the defendant, a nonresident person, committed a tort within this state against plaintiff, a resident of the state.[162]

Shortly after the *Alford* case was decided, the Fifth Circuit Court of Appeals handed down the decision of *Dawkins v. White Products Corp.*,[163] which further recognized the validity of the single tort provision of section 1437. In that case the plaintiff instituted suit in a state court against two nonresident corporations not qualified to do business in Mississippi, seeking to recover for damage done to his place of business by an allegedly defective hot water heater which had exploded. The heater in question had originally been manufactured by one of the defendants in Michigan, and the thermostat attached thereto had been manufactured by the other defendant in Ohio. The heater was placed in the stream of commerce by the defendants and eventually reached a local hardware store in Louisville, Mississippi, where it was purchased by the plaintiffs. Service of process was originally attempted on both defendants under section 1437, based on the allegation that they were "doing business" in this state. The case was removed to federal court, and the defendants promptly moved to dismiss for lack of jurisdiction. At this point the plaintiffs amended their declaration to allege that the defendants were also subject to jurisdiction under the single tort provision of section 1437. The defendants' motion to dismiss was sustained by the district court but was reversed on appeal to the Fifth Circuit Court of Appeals. Upholding jurisdiction over the defendants under the single tort provision of section 1437, the court noted that this portion of the statute had yet to be construed by the Mississippi Supreme Court and that all of the decisions since the provision had been added in 1964 had dealt solely with the "doing business" portion of the statute. Although without guidelines as to how this provision would be applied by the Mississippi Supreme Court, the court was of the opinion that the clear wording of the statute could not be ignored, and thus jurisdiction was upheld. The court commented:

> In view of the fact that this latest case makes clear that all of the earlier cases, as well as the one before it, treated only of the "doing business" basis for long-arm service, and in view of the very apparent intent of the legislature to *add* the contract basis and the local tort basis to the already existing basis of doing business within the state, we are inclined to follow the clear language of the statute in the absence of any Mississippi decision that states that these additional bases added nothing to the

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[162] *Id.* at 362.

[163] 443 F.2d 589 (5th Cir. 1971).

> statute. There is no such decision. We are convinced, Erie-bound as we are, to conclude that the Mississippi Supreme Court, given the facts and presented with the issue, would hold that the complaint as here amended alleged facts which, in spite of the affidavits of nonpresence in the state, would permit service on the non-residents under the amended long-arm statute. . . .[164]

The dam having been broken by the *Alford* and *Dawkins* cases, it was not long before the Mississippi Supreme Court was called upon to rule upon the validity of the single tort provision of section 1437. In *Smith v. Temco*[165] suit was instituted by two residents in circuit court in Mississippi against a foreign corporation not qualified to do business in this state, seeking to recover damages allegedly caused by the explosion of a hot water heater manufactured by the defendant. The facts reveal that the hot water heater in question had been manufactured outside this state and sold by the defendant to a Louisiana dealer, who sold the unit to a local Mississippi retailer, from whom it was purchased by the plaintiffs. The case was dismissed by the trial court for lack of jurisdiction. On appeal the sole question before the supreme court was whether section 1437, as broadened by amendment in 1964, conferred jurisdiction on the trial court. Since the sole contact of the defendant with the forum was the presence herein of an allegedly defective product, the court noted that its decision turned primarily upon the interpretation to be placed upon the language added by the 1964 amendment providing for assertion of jurisdiction based upon the commission of a tort "in part" in this state. In construing the single tort provision of section 1437, the court took the position that since a tort is not complete until injury connected therewith takes place, if the injury occurs in this state, a tort has been committed at least "in part" herein; and jurisdiction may properly be asserted under section 1437.[166] The court commented on its decision as follows:

> In our view, one of the fundamental objects of the Legislature in adopting the 1964 amendment was to extend the personam jurisdiction of the courts of this State to the nonresident who may commit a tort in this State, either in whole or in part, to

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[164] *Id.* at 594.

[165] 252 So. 2d 212 (Miss. 1971).

[166] It should be noted that some courts question whether the single tort provision of a long arm statute may serve as a proper basis for jurisdiction over a nonresident manufacturer whose sole contact with the forum state is the presence of a defective product unless there is a showing that the manufacturer could reasonably have anticipated that his product would be sold in the forum. *See* Bourdeaux, *How Long An Arm,* 4 MISS. DEF. L.J. 45, 49-51 (1969); Deveny v. Rheem Mfg. Co., 319 F.2d 124, 128 (2d Cir. 1963).

> the injury of a resident of the State so as to provide a practical means for the enforcement of rights accruing under the products liability doctrine.
>
> Under the amended statute, a nonresident manufacturer of a dangerously defective or unsafe product who places it in interstate commerce for the purpose of distribution and ultimate sale to consumers in other States, whether with a specific intent that it be distributed, sold and used in this State or not, may be subjected to a personam action for damages in the courts of this State by such consumer who may be injured in this State as a result of its defective or unsafe condition.[167]

Thus, in view of the *Alford, Dawkins* and *Temco* decisions,[168] there no longer seems any reason to doubt the validity of the single tort provision of section 1437. It is further submitted that the *Dawkins* and *Temco* decisions represent a liberal interpretation of this type of statute (since they approve of assertion of jurisdiction in situations where the tort is committed only partially within the forum) and may be taken as an indication that the single tort provision of the statute may now be utilized to the fullest extent possible.

C. *The Doing Business Provision*

The third and final category of nonresidents who are subject to service of process under section 1437 is those who ". . . shall do any business or perform any character of work in this State. . . .,"[169] which will be referred to as the "doing business" provision. This provision was unchanged by the 1964 amendments, and cases decided prior to 1964, discussed in Part I, are still pertinent when determining whether a nonresident may be subjected to service of process on this basis.

After applying various constitutional standards to this portion of the statute over the years,[170] the Mississippi Supreme Court announced a three-part test in *Mladinich v. Kohn*,[171] which has been uniformly applied since that decision was rendered in 1964.[172] In *Mladinich* the court held that the following three factors must always coincide before jurisdiction can properly be asserted:

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[167] 252 So. 2d at 215, 216.

[168] *See also* Bush v. Carpenter Bros., Inc., 447 F.2d 707 (5th Cir. 1971).

[169] MISS. CODE ANN. § 1437 (Supp. 1971).

[170] *See* Walker v. Savell, 335 F.2d 536 (5th Cir. 1964), for a complete discussion of the history of this portion of the statute prior to 1964.

[171] 164 So. 2d 785 (Miss. 1964).

[172] Dawkins v. White Prod. Corp., 443 F.2d 589, 593 (5th Cir. 1971).

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[173]

Since this test is nothing more than a composite reading of the due process requirements laid down by the United States Supreme Court in *International Shoe Co. v. Washington,*[174] *McGee v. International Life Insurance Co.,*[175] and *Hansen v. Denckla,*[176] its validity is clear.[177]

Although some earlier writers[178] have taken the position that the *Mladinich* rule is also applicable to the single contract and single contract tort provisions of section 1437, the case of *Dawkins v. White Products Corp.*[179] appears to dispel this notion and seems to indicate that the rule has thus far been applied by the Mississippi Supreme Court solely to the doing business provision of the statute. In *Dawkins* it was argued that the Mississippi Supreme Court had utilized the *Mladinich* case to establish standards to be applied to section 1437 as broadened by the 1964 amendment. However, the court rejected this contention and stated:

> We find nothing in the *Mladinich* opinion to warrant such a contention. We view the language, rather, as a cautionary note that additional basis for application of the Section had been added, but the court would not deal with them because they had not yet become the law.
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> It is true that the Mississippi Supreme Court has decided several cases under the amended statute in which the court has continued to treat of the "doing business" basis for service by repeating the same formulation of requirements outlined in Mladinich and earlier cases. . . .
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> However, careful analysis of each of these cases relied upon by appellee — . . . makes plain the fact that in *none* of these cases

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[173] 164 So. 2d at 790.

[174] 326 U.S. 310 (1945).

[175] 355 U.S. 220 (1957).

[176] 357 U.S. 235 (1958).

[177] *See* Note, *A New Sole For International Shoe, supra* note 64, at 351, wherein this rule was apparently originally promulgated.

[178] *See* Bourdeaux, *supra* note 166, at 45.

[179] 443 F.2d 589 (5th Cir. 1971).

> was the amendment dealing with a nonresident who committed a tort in whole or in part within the state in issue.[180]

The conclusion reached by the Fifth Circuit Court of Appeals in this regard was apparently correct, since shortly thereafter the Mississippi Supreme Court stated in *Smith v. Temco*[181] that it had never passed upon the effect of the 1964 amendment to section 1437.

In any event, there is little doubt that the *Mladinich* test is presently applicable to the "doing business" provision of section 1437, since it has been applied in virtually every decision rendered by the Mississippi Supreme Court since 1964.[182] In order to determine the manner in which this test has been applied, those cases decided under the doing business provision of section 1437 since 1964 require brief review.

In *Breckenridge v. Time, Inc.*[183] suit was instituted by Breckenridge, a resident of Mississippi, against Time, Inc., a nonresident corporation not qualified to do business here, seeking to recover damages for an allegedly defamatory article and accompanying pictures which appeared in a magazine published by the defendant. Service of process was attempted under section 1437, and Time appeared specially to contest jurisdiction. The following facts were developed at the hearing held on the defendant's motion to dismiss. Time is a New York corporation not qualified to do business in Mississippi, whose principal place of business is in New York City. It had no property or assets within the state of Mississippi nor did it lease any office space or maintain any bank accounts or corporate records within this state. A small amount of Time's advertising revenue was attributable to advertisers from within Mississippi. The only regular employees of the corporation who entered the state were an occasional manager or salesman who interviewed prospective advertisers; however, all advertising contracts were made in New York. Regular subscriptions to magazines published by Time were mailed from outside Mississippi directly to subscribers. The only direct sale of magazines by Time within the state was to wholesale distributors who in turn resold said magazines to retailers for consumption by the public. The only direct solicitation of subscriptions within the state by Time was through the mail; however, certain independent third parties were authorized to solicit subscriptions although they were without authority to enter into contracts on behalf of Time, all subscriptions being accepted in Chicago, Illinois. Material for articles appearing in magazines published by Time was obtained either from independent third parties known as "stringers" or from news releases put out by the Associated Press. The information for the story in question had been purchased from a stringer, and the pictures had also been sold by an independent third party to Time in a transaction which took place outside the state. This story had been written and edited in New York and was printed in Illinois, California, and Connecticut. Based on these facts, jurisdiction was declined by the trial court, and this decision was affirmed by the Mississippi Supreme Court. After noting that the rule set forth in *Mladinich* defined the constitutional limitations of section 1437, the court commented on the application of said rule:

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[180] *Id.* at 593.

[181] 252 So. 2d at 215.

[182] *See* Collins v. Truck Sales Equip., Inc., 231 So. 2d 187 (Miss. 1970); Hilbun v. California Western State Life Ins. Co., 210 So. 2d 307 (Miss. 1968); Republic Transcon Indus., Inc. v. Templeton, 253 Miss. 132, 175 So. 2d 185 (1965); Breckenridge v. Time, Inc., 253 Miss. 835, 179 So. 2d 781 (1965).

[183] 253 Miss. 835, 179 So. 2d 781 (1965).

> In the instant case Time, Inc., did not purposefully do any act or consummate any transaction in this state, so the cause of action did not arise from any act or transaction in this state. The quality, nature, and extent of the activity of appellee in the forum state were at the most inconsequential. . . .
>
> It would be unreasonable under these facts to assume jurisdiction, and would offend traditional notions of fair play and substantial justice. Those minimal contacts which are prerequisite to personal jurisdiction of the courts of Mississippi over a nonresident defendant are totally lacking as to appellee. Nor did this action arise out of any commercial or business transaction taking place in this state. Certainly just any inconsequential contact with the state of the forum is not sufficient to support jurisdiction over a nonresident under the due process clause. . . .[184]

In *Republic Transcon Industries v. Templeton*[185] suit was instituted by the plaintiff, Templeton, in the Circuit Court of Oktibbeha County, Mississippi, against the defendant, Republic Transcon Industries, a Michigan corporation not qualified to do business in Mississippi, seeking to enforce a default judgment previously entered against a subsidiary of the defendant known as the Mathes Company, Inc. At the time this default judgment was obtained, Mathes was owned by a third party and was purchased subsequently by Republic Transcon. The plaintiff asserted that Republic Transcon was liable for the judgment entered against Mathes, since it had acquired the assets of said corporation subject to its liabilities. Service of process was attempted on

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[184] *Id.* at 784.

[185] 253 Miss. 132, 175 So. 2d 185 (1965).

Republic Transcon by serving Kleban, a local resident, alleged by the plaintiff to be the agent of Republic in its operation of Mathes, and by service on the Secretary of State under section 1437, based on the allegation that the defendant was doing business herein. The facts reveal that Kleban operated a heating and cooling business in Oktibbeha County and had been a sales representative of Mathes. However, other than having ordered various parts by mail, he had virtually no contact with Republic Transcon, nor had he installed any Mathes equipment or issued any warranties on such equipment after Mathes was acquired by Republic Transcon. Republic Transcon owned no property within this state and had no agents or employees herein, all sales being made solely through "sales representatives" who worked on a commission basis and over whom the company had no control. Republic Transcon's motion to dismiss for lack of jurisdiction was overruled, and subsequently the plaintiff procured a default judgment when Republic Transcon failed to comply with further orders of the court. On appeal the Mississippi Supreme Court held that the lower court did not have jurisdiction because Kleban had not been an agent of the defendant upon whom process could be served,[186] and the defendant had done nothing within this state which would subject it to jurisdiction under the rule announced in *Mladinich v. Kohn*.[187]

In *Hilbun v. California-Western States Life Insurance Co.*[188] the plaintiff instituted suit in a state court of Mississippi, seeking to enforce a claim under an insurance policy issued by the defendant, a nonresident insurance company. Service of process was attempted on the defendant pursuant to section 5705-12,[189] which is similar to section 1437

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[186] *Id.* at 188.

[187] *Id.* at 189.

[188] 210 So. 2d 307 (Miss. 1968).

[189] MISS. CODE ANN. § 5705-12 (Supp. 1971). This section provides in part for service of process over foreign insurance companies not authorized to transact business in Mississippi as follows:

> Any of the following acts in this state, effected by mail or otherwise, by an unauthorized or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of insurance business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office, to be its true and lawful agent, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same

and provides for service of process over foreign insurance companies not authorized to transact business in Mississippi. The policy in question had been issued to the plaintiff while he was in Louisiana, and he had suffered the injury upon which he based his claim while outside this state. The defendant had never been licensed to do insurance business in this state, had no agents or employees herein for the purpose of selling insurance, and solicited no sales of insurance by mail within the state. The only contact which the defendant had with Mississippi was the fact that in one instance it had paid a portion of a hospital bill under the policy of insurance covering the plaintiff. Based upon this set of facts, the lower court declined to assert jurisdiction. On appeal the Mississippi Supreme Court noted the similarity between section 5705-12 and section 1437 and stated that applying the test announced in *Mladinich* to the case then before it, the lower court had properly determined that it did not have jurisdiction, commenting:

> In applying these standards to the present case and being aware of the fact that the employer is the agent of the employee, we are of the opinion that the lower court correctly held there was insufficient minimal contact to constitute the insurance commissioner the agent for service of process, as the part payment was an isolated, single act instituted by the appellant through his employer and was not the act of the insurer in soliciting, issuing, or delivery of contract or policy of insurance. It also was not such transaction of insurance business as would constitute bringing the statute into effect, as this isolated act would violate, in our opinion, traditional notions of fair play and substantial justice when consideration is given to the quality, nature, and extent of the defendant's activity in this state.[190]

In the case of *C. H. Leavell & Co. v. Doster*[191] an action was instituted in a state court by two nonresident corporations, both of whom were qualified to do business in Mississippi, against a third corporation not qualified to do business in this state. The plaintiffs were primary contractors, and this suit arose out of the performance of a subcontract entered into with the defendant. The plaintiffs alleged that in the performance of the contract in question within Mississippi, the defendant was doing business herein. Service of process was effectuated under section 1437, but on motion of the defendant the case was dismissed for lack of jurisdiction. On appeal the supreme court reversed the action of the lower court and held that by having performed the

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legal force and validity as personal service of process in this state upon such insurer.

[190] 210 So. 2d at 310, 311.

[191] 211 So. 2d 813 (Miss. 1968).

contract in question within this state, the defendant was subject to jurisdiction under the "doing business" provision of section 1437 as well as the "single contract" provision of that statute.[192]

In *Collins v. Truck Sales Equipment, Inc.*[193] suit was instituted by the plaintiff, Collins, for damage done to his store when it was struck by a truck owned by Hilbun Farms, Inc. and modified by the defendant, Truck Sales Equipment, Inc., at its plant in Alabama. The defendant appeared and filed a motion to dismiss for lack of jurisdiction which was sustained by the trial court. The facts revealed that the president of the defendant corporation had made a number of trips to Mississippi in working out the details of the work to be performed for Hilbun Farms, and said corporation had several representatives within the state soliciting the sale and installation of its products. However, all trucks modified by the defendant had been delivered by the owners to the defendant's plant in Alabama, where the work in question was performed, and picked up there by the owners after repairs had been completed. On appeal the Mississippi Supreme Court held that the lower court had properly dismissed the case for lack of jurisdiction. The court noted that the test announced in *Mladinich v. Kohn* and subsequent decisions spelled out the requirements for determining whether one is "doing business" in Mississippi and stated that the plaintiff had failed to meet these requirements since ". . . he did not establish any causal relationship between the negligence alleged and the activities of the defendant within the forum state."[194]

In *E. B. Kaiser Co. v. Ludlow*[195] suit was filed in state court by H. M. Ludlow, d/b/a H. M. Ludlow Company, a resident of Mississippi, against E. B. Kaiser Company, an Illinois corporation not qualified to do business herein, to recover commissions allegedly due under an exclusive sales representative agreement executed by the parties. Under this contract Ludlow solicited orders for, supervised installation of, and investigated and corrected complaints pertaining to Kaiser products. In addition thereto, representatives of Kaiser had visited the state in connection with the sales out of which the controversy in question had arisen. Kaiser appeared specially and moved to dismiss on the basis that it was not amenable to service of process. This motion was overruled by the trial court and affirmed on appeal to the Mississippi Supreme Court. The supreme court made no mention of the *Mladinich* rule in its opinion, but commented as follows:

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[192] *Id.* at 814-15. It is submitted that the failure of the court to mention the Mladinich rule in this case was due to the fact that jurisdiction was asserted primarily under the single contract provision of section 1437.

[193] 231 So. 2d 187 (Miss. 1970).

[194] *Id.* at 188. This holding would appear to be based on the second requirement set out in the Mladinich rule which requires that the cause of action must arise out of whatever activity the nonresident may have taken in the forum state.

[195] 243 So. 2d 62 (Miss. 1971).

> The "long arm" statute in its present form was in force at the time of the last renewal of the contract between Kaiser and Ludlow and before completion of the orders or jobs for which commissions were claimed by Ludlow. . . .
>
> . . . .
>
> We are of the opinion that the chancellor was justified in finding that Kaiser was amenable to the process and jurisdiction of the courts of this state. The contract with Ludlow was fully performed by Ludlow in this state. . . . Kaiser did business in the state in the amount of $613,190, consisting of seven different orders or jobs with six different firms engaged in the construction of the test facility for NASA. Because of the unusual processes of installation of the insulated piping involved in these orders, officials and other representatives of Kaiser made numerous trips to the test facility site to assist in the installations.
>
> Kaiser's business activities in Mississippi were rather extensive. It cannot be said that the quality and nature of these activities were inconsequential. In our opinion the chancellor was fully justified in finding that Kaiser was doing business in the state within the meaning of the statutes making nonresidents amenable to suit in this state. . . .[196]

Brief mention should also be given to certain federal cases handed down since 1964, which deal with "doing business" as a means of jurisdiction under the statute.[197] In *Easterling v. Volkswagen of America, Inc.*[198] the plaintiff, a resident of Mississippi, filed suit in a state court against Volkswagen of America, International Auto Sales & Service, Inc. (both nonresident corporations not qualified to do business in Mississippi), and Steadman Motor Company, Inc., a Mississippi corporation. Volkswagen of America is an importer of foreign cars, which it sells to regional distributors throughout the United States. International Auto Sales & Service, Inc. was a regional distributor of Volkswagen automobiles for the mid-south area, which included Mississippi. Steadman

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[196] *Id.* at 66, 67.

[197] It should be noted that this article does not contain a complete discussion of all federal decisions which have construed section 1437 since 1964. *See* Bush v. Carpenter Bros., Inc., 447 F.2d 707 (5th Cir. 1971); Magna Corp. v. Duqvesne Elec. & Mfg. Co. (S.D. Miss. 1971), not yet reported, and Casano v. WDSU-TV, Inc., 313 F. Supp. 1130 (S.D. Miss. 1970).

[198] 308 F. Supp. 966 (S.D. Miss. 1969).

Motor Company, Inc. was a retail dealer in the State of Mississippi and purchased its vehicles from International Auto Sales & Service, Inc. The plaintiff's suit was based on breach of warranty and negligence in the design of a Volkswagen automobile in which his wife was injured. The car in question had been imported to the United States by Volkswagen of America, sold to International Auto Sales & Service, Inc., who had sold the vehicle to the Willard E. Robertson Corporation, a New Orleans, Louisiana, retail dealer; and the plaintiff was a subsequent purchaser thereof. Suit was voluntarily dismissed against Steadman Motor Company, Inc. and on motion of the remaining defendants, the case was removed to federal court. Thereafter, both defendants filed separate motions to dismiss for lack of jurisdiction. Since Volkswagen of America had virtually no contacts with the state of Mississippi, its motion was sustained and will not be discussed here. The facts revealed that International was not qualified to do business in Mississippi, maintained no telephone listing, bank account, corporate books, office, warehouse or place of business within the State, and had paid no taxes here. However, as set out above, International purchased Volkswagen automobiles and parts from Volkswagen of America which it in turn sold to retail Volkswagen dealers throughout the State of Mississippi. International had salesmen and other employees, two of whom lived in Mississippi, visiting various dealers throughout the state on a regular basis. International had entered into a dealership agreement with Steadman Motor Company (and possibly with other Mississippi retail dealers), and under the terms of this contract, International maintained almost complete control over the manner in which the local dealer operated his business. Based on these contracts, the court was of the opinion that there could be little doubt that the defendant was doing business in the state of Mississippi. However, applying the second of the three-part test set out in *Mladinich v. Kohn,* the court declined jurisdiction since the suit did not arise out of any business which the defendant had transacted within the State. In a well-reasoned opinion the court discussed its decision in this regard as follows:

> Having determined that the first criterion for conferring jurisdiction over nonresident corporations laid down in Mladinich v. Kohn, *supra,* has been met, that is, that the nonresident defendant foreign corporation, International, "has purposefully done some act or consummated some transaction in the forum state" and thus has done business in the State of Mississippi, it is next necessary to determine whether the second required prerequisite has been satisfied, namely, whether the cause of action herein has "arisen from or is connected with such act or transaction." The answer to this question is in the negative,

> inasmuch as the automobile in question was not delivered by International to its dealer, Steadman, within the State of Mississippi nor was it sold by International to plaintiff or her husband in this state or in any other state. If, the plaintiff's cause of action arose out of these contacts or out of International's "doing business" in this State, e.g. if plaintiff's injuries had resulted from the defect in the Volkswagen shipped or sold directly to Steadman by International which ultimately reached plaintiff or her husband or any purchaser or seller in the line of sale after leaving Steadman, this second requirement would unquestionably be satisfied, but such is not the case. Instead, this Volkswagen in question was sold by International to its dealer, Willard E. Robertson Corporation in New Orleans, who sold it to a purchaser and subsequently down the line of commerce it was purchased or acquired by plaintiff's husband. . . . Thus International is not amenable to process by the Courts of this State, State or Federal, since the present action does not arise out of, accrue from, and is not connected with the "business" conducted by International through Steadman in the State of Mississippi, as required by Section 1437 of the Miss. Code as construed in Mladinich v. Kohn. In other words, this cause of action did not arise out of or accrue from and is not connected with the delivery by International to any dealer, including Steadman, within the State of Mississippi and thus it may not be subjected to suit in the courts within this State under the Mladinich doctrine, despite the fact that in the absence of this requirement, due process would be satisfied by the above activities or "contacts" of International within the State of Mississippi. . . .[199]

Another case decided by the U. S. District Court for the Southern District of Mississippi presents some unique problems in connection with this portion of section 1437. In *Hyde Construction Co. v. Koehring Co.*[200] separate suits were filed by a Mississippi corporation and an individual resident of this state against a Wisconsin corporation in the Circuit Court of Hinds County, seeking damages for abuse of process of the United States District Court for the Northern District of Oklahoma. Both cases were removed to U.S. District Court for the Southern District of Mississippi and were considered together on the defendant's motion in each case to dismiss for lack of jurisdiction. The facts set out in the opinion revealed that the defendant had been authorized to do business in Mississippi between January 9, 1964, and September 12, 1968, and during such time had appointed a local corporation as its agent for service of process. On September 12, 1968, pursuant to the terms of section 5309-234,[201] it withdrew from the state and revoked the authority of its local agent to accept process on its behalf. This section provides that any nonresident corporation which is qualified to do business in Mississippi may voluntarily withdraw from the state and revoke the authority of its registered agent to accept process on its behalf, but it further provides that in order to do so, the corporation must consent to service of process on the Secretary of State of Mississippi in any subsequent cause of action which arose in this state during the time it was qualified to do business here. Plaintiffs originally predicated jurisdiction under this section by service on the Secretary of State of Mississippi, alleging that their causes of action had accrued during the time the defendant was authorized to do business herein. By amendment the plaintiffs further asserted that defendant was amenable to service of process under the "doing business" provision of section 1437, alleging that after the date of its formal withdrawal from this state, it had continued transacting business herein of a sufficient nature to constitute doing business within the meaning of this provision.[202] Discussing the problems involved in the case, the court first noted that section 1437 was applicable only to corporations who were not qualified to do business in Mississippi, and therefore the actions of the defendant during the period it was qualified to do business in this state could not serve as a basis for assertion of jurisdiction under said section. Thus, only the actions of the defendant subsequent to September 12, 1968, were considered by the court in determining if the doing business provision of section 1437 could properly be applied. The opinion rendered by the court further reveals that after the defendant formally withdrew from Mississippi in 1968, it continued to conduct a substantial amount of business activity herein. Although it maintained no offices within the state and had no employees residing herein, two of its employees visited the state each month to supervise and assist various local distributors of the defendant's products. The defendant had also entered into contracts with local distributors whereby it maintained a moderate degree of control over the manner in which these distributorships were operated. In addition, the defendant's sales within the state after its withdrawal were almost equal to its sales prior to that time. Based on this business activity, the court was of the opinion that the defendant was "doing business" in the state of Mississippi. However, the court further determined that since the plaintiffs' causes of action (for abuse of process on Oklahoma) did not arise out of and were not connected with any business activity which the defendant transacted within Mississippi, under the rule announced in *Mladinich v. Kohn,*[203] jurisdiction could not be asserted under the doing business provision of section 1437. The court discussed the *Mladinich* rule as follows:

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[199] *Id.* at 981.

[200] 321 F. Supp. 1193 (S.D. Miss. 1969).

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[201] Miss. Code Ann. § 5309-234 (Supp. 1971). This section provides in part as follows:

> A foreign corporation authorized to transact business in this state may withdraw form (sic) this state upon procuring from the Secretary of State a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, which shall set forth: . . . . (d) That the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on such corporation by service thereof on the Secretary of State. . . .

[202] It should also be noted that the plaintiffs sought to assert jurisdiction under the single tort provision of section 1437, however, since the court's decision did not turn on this provision, it will not be considered here. The court also considered whether jurisdiction could be asserted pursuant to the terms of Miss. Code Ann. §§ 5345 and 5346 (1956), however, time and space limitations also preclude discussion of these sections.

> Having determined that the first criterion for conferring jurisdiction over nonresident corporations laid down in Mladinich v. Kohn, *supra,* has been met, that is, that Koehring "has purposefully (done) some act or consummate (d) some transaction in the forum state", and thus has done business in the State of Mississippi, it is next necessary to determine whether the second required prerequisite of *Mladinich* has been satisfied, namely, whether the cause of action herein has "arisen from, or is connected with, such act or transaction." The answer to this question is in the negative, inasmuch as the alleged abuse of process did not arise from and is not connected with any of the acts or transactions carried on by Koehring in the State of Mississippi subsequent to September 12, 1968. If Koehring is guilty of abuse of process, this abuse of process did not arise from or is not connected with its business activities in the State of Mississippi from September 12, 1968 to the present. . . .[204]

However, even though jurisdiction could not be asserted under section 1437, the court determined that the defendant was amenable to service of process under the provisions of section 5309-234, since the plaintiffs' causes of action arose during the time the defendant was authorized to transact business here and thus under the provisions of said section, when the defendant withdrew from this state, it consented to service of process on the Secretary of State in such actions. Therefore, the defendant's motions in these two cases were overruled.

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[203] 250 Miss. 138, 164 So. 2d 785 (1964).

[204] 321 F. Supp. 1205, 1206.

It is clear that decisions of the Mississippi Supreme Court under the doing business provision of the statute since 1964 continue to require a substantial amount of business activity within the forum before jurisdiction will be upheld on this basis. If the court is willing to find that the due process requirements are satisfied in cases where the sole contact of the defendant is a single tort or a single contract, there is no reason to continue to require continuous and systematic activity in order to uphold jurisdiction under the doing business provision. Uniformity of the application of these standards to all provisions of the statute seems both desirable and logical.

III. Conclusion

It is evident that the literal terms of section 1437 provide a broad basis for the assertion of jurisdiction over nonresident defendants. Although the statute has not been construed as broadly as is permissible under federal decisions, a trend in favor of a more liberal utilization of its provisions does appear to be emerging. It is respectfully submitted that there is no longer any sound reason for adhering to a restrictive interpretation of the statute which, in effect, denies citizens of this state the opportunity to fully avail themselves of the means provided by the legislature for subjecting nonresidents to suit in Mississippi.

Since the terms of section 1437 are extremely broad, the basic consideration in every case should be whether the assertion of jurisdiction violates the requirements of due process as defined by the decisions of the United States Supreme Court. These requirements are primarily set forth in the decisions of *International Shoe Co. v. Washington, McGee v. International Life Insurance Co.,* and *Hanson v. Denckla* and have been succinctly summarized by the Mississippi Supreme Court in the three-part test announced in *Mladinich v. Kohn.* To insure that the requirements of due process are applied in a uniform manner, it is submitted that the three-part test announced in *Mladinich* should serve as the basis for determining whether jurisdiction is proper in every case arising under section 1437, although at present it is applied only to cases decided under the doing business provision of the statute. If our courts are willing to redefine the word "act," as used in this test (as have courts in other jurisdictions) to encompass such activities as use of the mail for solicitation of business and shipment of defectively manufactured products into this state, there is no reason why the test can not also be applied to the single tort and single contract provisions of the statute.

By the adoption of a single test to be applied in all cases arising under section 1437, much of the confusion which has existed in the past, as to how the various provisions of the statute should be applied, would be cleared, and a certain degree of uniformity in future decisions would be assured.

JOINT TORTFEASORS – A CASE FOR UNLIMITED CONTRIBUTION

*Harry R. Allen**

I. INTRODUCTION

Occasionally a tortfeasor is selected as the sole defendant in Mississippi in a cause of action arising out of the concurrent negligence of several wrongdoers. This is not common since the plaintiff is usually generous with his processes, directing them at any possible defendant who might contribute to a larger verdict. When it does occur, the discrimination is painfully frustrating to the defendant tortfeasor. "Misery" is the condition suffered by one of several joint wrongdoers who has been selected as the single defendant in a Mississippi court. Under the present law of contribution in Mississippi, that defendant must prepare for a legal "blitz," no matter how slight his negligence as contrasted to that of his concurrent tortfeasor, for that defendant has no right of contribution. Section 335.5 of the Mississippi Code only permits a right of contribution among joint tortfeasors when a joint judgment has been entered.[1] The Mississippi Supreme Court has interpreted this statute strictly.

The scope of this article is limited to the question of "contribution," rather than "indemnity."[2] Courts have often mistakenly intermingled the two terms.[3]

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[1] MISS. CODE ANN. § 335.5 (1956). See app. I *infra.*

[2] A discussion of rights of indemnity can be found in W. PROSSER, LAW OF TORTS § 48 (3d ed. 1964). See also Comment, *Contribution Among Joint Tortfeasors,* 44 Tex. L. Rev. 326 (1965). The Mississippi Supreme Court has recognized the right of "indemnity" among tortfeasors in Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So. 2d 216 (1941), where it was held that a master was entitled to indemnity from his servant when the master's total responsibility was a vicarious liability for the tortious acts of the servant.

[3] *See* Thomas v. Rounds, 161 Miss. 713, 137 So. 894 (1931); Illinois Central R.R. v. Bullock, 181 F.2d 851 (5th Cir. 1950); St. Louis-San Francisco Ry. v. United States, 187 F.2d 925 (5th Cir. 1951). *See also* Annot., 60 A.L.R.2d 1366 (1958), where it is stated:

> It is important that the reader bear in mind the distinction between a right to contribution and a right to indemnity, contribution importing the idea of equilization of burden, and indemnity or exoneration importing reimbursement in full to the party who has satisfied the injured person, on a theory of a primary liability resting on a person from whom recovery is sought. [*Id.* at 1369.]

The purpose of this article is to illustrate the basic injustice of the present Mississippi rule, which permits contribution among joint tortfeasors only in the very limited statutory situation of joint judgments. It attempts to trace the origin of the rule, examine trends throughout the country, analyze the present status of Mississippi law and consider the Uniform Contribution Among Tortfeasors Act.[4]

II. BASIC INEQUITIES OF THE COMMON LAW RULE RELATING TO JOINT TORTFEASORS

The right of contribution is one of equity. It appears that the doctrine is applicable when three elements are present: (1) a common liability; (2) a compulsory discharge of this common liability; and (3) one party bearing an unequal portion of the common burden.

> Contribution is an independent right, inherently equitable in nature, and will not be enforced where it will produce an inequitable result.[5]
>
> The right of contribution grows out of the relation of the parties to the obligation or from the nature of the relation between them and out of what they do. It is almost universally agreed that the doctrine of contribution is founded not upon contract but upon principles of equity and natural justice, which require that persons under a common burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligors. It is equally true, therefore, that the doctrine of contribution is founded upon morality, since no one ought to profit by another man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim and upon motives of mere caprice or favoritism to make a common burden a most gross personal oppression; it would be against equity for the creditor to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment.[6]

The common law rule relating to joint tortfeasors is an exception which is diametrically opposed to the general common law principle permitting contribution among joint obligors. As the rule is stated by the *Restatement of Restitution*:

> Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them

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[4] 9 U.L.A. 127 (Supp. 1967). *See* app. 2 *infra*, for complete text.

[5] 18 AM. JUR. 2d *Contribution* § 3 (1965).

[6] *Id.* § 4.

> who has made expenditures in the discharge of their liability is not entitled to contribution from the other.[7]

Yet, the comment in the *Restatement* expresses no enthusiasm for the rule:

> a. The rule stated in this Section which denies contribution to one of two negligent persons whose negligence has contributed to an injury to a third person for which both are liable is explainable only on historical grounds.[8]

Prosser recognizes the injustices of the rule:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.[9]

While the hardship of the rule is not often felt, applicable controversies are not uncommon. Consider the guest passenger in a two-car accident who refuses to sue his driver-companion out of friendship or no insurance. In another case one tortfeasor may be a "target" defendant (a common carrier or transport truck), and the other may be an individual with obviously limited financial means. In the latter event, the plaintiff could be fearful that a joinder of the individual tortfeasor in the same action with a "target" defendant would tend to minimize his verdict. Under these circumstances, the named defendants are required to absorb the entire loss.

We generally think of a "common law rule" as the embodiment of a traditional principle of inherent justice which has been tempered by years of usage. Ironically the "common law rule," as it evolved concerning contribution among wrongdoers of concurrent negligence, has stifled an equitable principle.

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[7] RESTATEMENT OF RESTITUTION § 102 (1937). For a general discussion of the common law rule prohibiting contribution between those regarded as "joint tortfeasors," when one had discharged the claim of the plaintiff, *see* Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130 (1930); Bohlen, *Contribution and Indemnity Between Tortfeasors,* 21 CORNELL L. Q. 552 (1936), 22 CORNELL L. Q. 469 (1937); Hodges, *Contribution and Indemnity Among Tortfeasors,* 26 TEX. L. REV. 150 (1947), Note, *Contribution and Indemnity Between Joint Tortfeasors,* 45 HARV. L. REV. 349 (1931); Note, *Contribution Between Persons Jointly Liable in Tort,* 35 GEO. L. J. 382 (1947); Note, *Contribution and Indemnity Among Tortfeasors in Minnesota,* 37 MINN. L. REV. 470 (1953); Comment, *The Rule Against Contribution and its Status in Nebraska,* 37 NEB. L. REV. 820 (1958); Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases,* 68 YALE L. J. 964 (1959).

[8] RESTATEMENT OF RESTITUTION § 102 (1937).

[9] PROSSER, *supra* note 2, § 47 at 275.

> The general doctrine that one of several persons equally situated who has been compelled to bear more than his equitable share of a common burden is entitled to contribution from the others who have borne less than their respective shares has been subjected to a general qualification in cases where the common burden is a joint liability of such persons as tortfeasors or wrongdoers. In the absence of a statute in the particular jurisdiction governing the right, it has been frequently declared judicially that as among or between joint wrongdoers or tortfeasors there can be no contribution, and that one of several persons who become liable to another for a wrong cannot enforce contribution from his co-wrongdoers although he is compelled to discharge the whole or more than his share of such liability. This broad proposition is usually, in the absence of statute, asserted as the general rule, although it is doubtless more accurate to regard it as a general exception to the established rules allowing contribution.[10]

III. Origin Of The Rule

How did the common law give birth to this exceptional doctrine prohibiting contribution among joint tortfeasors? It is generally recognized that the rule had its origin in the 1799 case of *Merriweather v. Nixan*.[11] In this case there had been an action for conversion and a joint judgment against two defendants who had acted in concert in committing the tort. One of the two defendants, who had been levied upon for the whole judgment, sought contribution from the other on the theory of an implied promise, "as for such money paid his use." Lord Kenyon dismissed the action in contribution stating that he had never heard of such an action when the former judgment was for a tort. The ground of his decision appears to have been simply that the parties had acted intentionally and in concert. Therefore, the plaintiff's claim of contribution was a result entirely of his own deliberate wrong.

In the celebrated Highwayman's Case, *Everett v. Williams*,[12] there was a suit by one highwayman against another for an account of their plunder. The aftermath of that case was so disasterous for both parties and the plaintiff's solicitors that it could have very well discouraged anyone from seeking a right of contribution for all time. The bill was dismissed with costs to be paid by the defendant, but the plaintiff's solicitors were attached and fined fifty pounds each for contempt. Both the plaintiff and the defendant were subsequently hanged.

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[10] 18 Am. Jur. 2d, *Contribution* § 33 (1965).

[11] 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).

[12] Ex. 1725, reported in 1893, 9 L.Q. Rev. 197 and Costigan's Cases on Legal Ethics, p. 399 (1917).

In 1894 the question of contribution was raised in an English case of concurrent negligence, and contribution was allowed.[13] Contribution is now permitted by statute in England.[14]

Prosser observes that the early American cases applied the rule against contribution in cases of wilful misconduct but refused to apply it where the tort committed by the claimant was a matter of negligence or mistake.[15] Apparently, as the law relating to joint tortfeasors evolved in this country, the origin of the rule in the old English cases and the early American cases was completely ignored. The limitations of the rule to cases involving intentional torts was soon forgotten.

> The great majority of our courts proceeded to apply it generally, and refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result. Over a period of more than a century, only nine American jurisdictions have come to the contrary conclusion, allowing contribution without legislation: the District of Columbia, Iowa, Louisiana, Maine, Minnesota, Nevada, Pennsylvania, Tennessee, and Wisconsin.[16]

In *Best v. Yerkes*[17] the Iowa court recognized that a majority of jurisdictions do not distinguish between "intentional" and "unintentional" torts in applying the principle of no contribution. However, this court adopted the minority rule:

> These authorities seem to us to overlook the fundamental basis for denying recovery over, either by way of indemnity or contribution; that is, that the intentional wrongdoer is not entitled, as a matter of public policy, to the aid of the law in adjusting any claims against his confederate, his collaborator in causing a deliberate and planned injury to a third party. This was the reason for the rule adopted in Merryweather v. Nixon, supra. But this reason fails when the tort committed against the third party was due to inadvertence, without any intent to the part of the tort-feasors to injure him. Consequently, we

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[13] Palmer v. Wick and Pultneytown Steamshipping Co., [1894] A.C. 318.

[14] WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE, §§ 25-54 (1951).

[15] PROSSER, *supra* note 2, § 47.

[16] *Id.*

[17] 247 Iowa 800, 77 N.W.2d 23 (1956).

conclude that the minority rule which permits contribution or indemnity in negligence cases had the firmer foundation.[18]

IV. Statutory Right Of Contribution

Although only nine American jurisdictions have allowed contribution without legislation, twenty-five states have now enacted legislation permitting that right.[19] Of those states only South Dakota, Pennsylvania, New Mexico, Maryland, Hawaii, Rhode Island, Arkansas and Delaware have adopted the Uniform Contribution Among Tortfeasors Act. The other legislation states have adopted a variety of statutes.[20] The states of New York, Missouri, Michigan, West Virginia, Kansas, Texas, as well as Mississippi, provide for the right of contribution only when a joint judgment has been entered.

Unfortunately the Mississippi statute does little to rectify the inequities of the common law rule. Tortfeasors against whom a joint judgment has been rendered generally pay their pro rata share of the judgment if all tortfeasors are solvent or insured. It is only when one of the defendants is unable to pay that the plaintiff forces the judgment to be paid entirely by one solvent or insured tortfeasor. In that event, the defendant who was required to pay the full amount of the judgment has a right of contribution under our statute. That right is purely academic since the other defendant was insolvent or uninsured.

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[18] *Id.* at 28. The tortfeasor contribution question became the subject of a debate among legal periodical authors. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism,* 54 Harv. L. Rev. 1156 (1941); Jones, *Contribution Among Tortfeasors,* 11 U. Fla. L. Rev. 175 (1958). The James article led to the debate: Gregory, *Contribution Among Joint Tortfeasors: A Defense;* James, *Replication;* Gregory, *Rejoinder,* all in 54 Harv. L. Rev. 1170 (1941).

[19] Ark. Stat. Ann. §§ 34-1001 to -1009 (1962); Cal. Civ. Pro. Code § 875 (West Supp. 1971); Del. Code Ann. tit. 10 §§ 6301-08 (1953); Ga. Code Ann. § 105-2012 (1968); Hawaii Rev. Laws §§ 663-11 to -16 (1968); Kan. Stat. Ann. § 60-2413 (1964); Ky. Rev. Stat. § 412.030 (1969); La. Code Civ. Pro. Ann. arts. 1111-1116 (1960); Md. Ann. Code art. 50 § 16-24 (1968); Mass. Gen. Laws Ann. ch. 231 §§ 1-4 (Supp. 1968); Mich. Stat. Ann. § 27A.2925 (1962); Miss. Code Ann. § 335.5 (1956); Mo. Rev. Stat. § 537.060 (1949); N. J. Rev. Stat. §§ 2A:53A-1 to -5 (1951); N. M. Stat. Ann. §§ 24-1-11 to -18 (1953); N. Y. Civ. Prac. § 1401 (McKinney Supp. 1971); N.C. Gen. Stat. § 1B-1 (1969); N.D. Cent. Code §§ 32-38-01 to -04 (1960); Pa. Stat. tit. 12 § 2082-89 (1967); R.I. Gen. Laws Ann. §§ 10-6-1 to -11 (1969); S.D. Code §§ 15-8-11 to -22 (1967); Tex. Rev. Civ. Stat. Ann. art. 2212 (1964); Va. Code Ann. § 8-627 (1957); W. Va. Code Ann. §§ 55-7-12 to -13 (1966); Wis. Stat. §§ 113.01 to .05 (1957).

[20] Va. Code Ann. § 8-627 (1957) provides: Contribution among wrong doers may be enforced when the wrong is a mere act of negligence and involved no moral turpitude.

> Ga. Code Ann. § 105-2012 (1968) provides the right of contribution:
>
> (1) where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued. (2) If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable for contribution.

N.J. Rev. Stat. § 2A:53A-1 to -5 (1951) provides simply that the right of contribution exists among joint tortfeasors.

N.C. Gen. Stat. § 1B-1 (1969) provides that "there is a right of contribution among them even though judgment has not been against all or any of them."

Texas has a contribution statute which is very similar to that of Mississippi. However, the appeals court in Texas quickly recognized the uselessness of a limited contribution statute and refused to give it a narrow interpretation. In *Lottman v. Cuilla*[21] suit was instituted by the plaintiff for personal injuries sustained from a fall on a defective sidewalk in front of certain property belonging to the individual defendant in Houston, Texas. The individual defendant attempted to join the City of Houston as a party defendant, but the lower court sustained a demurrer by the city. The appeals court held that the lower court erred in sustaining that demurrer. Although the court observed that the general principal of "no contribution" among joint tortfeasors had been recognized in Texas until the Act of 1917,[22] the court interpreted the statute as follows:

> This clearly recognizes the principle of enforced contribution amongst joint tort-feasors, thus changing the common-law rule upon that subject. It is true literally the statute applies to judgments rendered against two or more wrongdoers. But the evident purpose of the fact was to relieve the rigor of the common law, so as to place the burden, as amongst themselves, equally upon all the solvent tort-feasors. There is no reason to hold the Legislature meant to exclude from the benefits of the statute those cases where, as here, the plaintiff did not elect to sue all the tort-feasors; but every consideration impels us to hold that the defendant sued may, and should be allowed to, bring in other wrongdoers, provided he does so in such way as not to delay or otherwise prejudice the plaintiff's case.[23]

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[21] 288 S.W. 123 (Texas 1926).

[22] TEX. REV. CIV. STAT. ANN. art. 2212 (1964) states:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery over, by and between the defendants is given by statute, or exists under the common law, shall, upon payment of said judgment, have a right of action against his codefendant or codefendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment.

[23] Lottman v. Cuilla, 288 S.W. 123, 126 (Texas 1926).

It would have been an easy matter for the Texas court to avoid the responsibility for dealing with the basic inequities of that problem by simply stating that the statute was in derogation of the common law and should be strictly construed. Of course, Mississippi has the additional problem of no third party practice. However, the Mississippi Supreme Court could emulate the attitude of the Texas court in *Lottman* and look to the basic intent of section 335.5. It is significant that the preamble to Senate Bill No. 322, which later became section 335.5 of the Code, includes: An act to provide for the contribution between joint tortfeasors or persons jointly or severely liable to judgment.[24] Perhaps this language indicates that the legislature did not intend a limited change in the common law rule.

V. THE RULE AND MISSISSIPPI

One of the great "trademarks" of the legal system in this country has been its adherence to common law rules. This system has proved to be the best compromise between stability and change. It has been the very fabric of our society. In recent years there has been much criticism of our courts for sacrificing the stability of tradition in favor of changes which are somewhat radical. However, there have been occasions when the courts impeded orderly progress by hesitation to crack the shell of tradition in their interpretation of common law rules. As this mistake is multiplied over the decades, the shell is hardened, and the rule becomes even less flexible. Perhaps this explains the stubborn persistence of the common law principle against contribution among joint tortfeasors. A few courts, such as the District of Columbia in *Knell v. Feltman*,[25] have resisted this trend. The plaintiffs were guest passengers of an automobile, owned and operated by Knell, which was involved in a collision with a taxicab owned and operated by Feltman. The plaintiffs filed suit against Feltman. Feltman filed a third party complaint against Knell. Knell appealed on the theory that there could be no contribution among joint tortfeasors before a judgment was rendered. After discussing the basic inequities of the rule which would prohibit contribution, the court observed:

> We conclude that when a tort is committed by the concurrent negligence of two or more persons who are not intentional wrongdoers, contribution should be enforced; that a joint judgment against such tortfeasors is not a prerequisite to contribution between them, and it is immaterial whether they were, or

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[24] Gen. Laws Miss., ch. 259 (1952).

[25] 174 F.2d 662 (D.C. Cir. 1949).

> any of them was, personally negligent . . . that when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment, contribution may be enforced.[26]

Unfortunately the Mississippi Supreme Court has never been called upon to question the basis for the common law rule as it relates to tortfeasors. The rule apparently has never been directly challenged in Mississippi. In *Klaas v. Continental Southern Lines, Inc.*[27] judgments were entered against joint tortfeasors, a bus company and truck owner, before passage of section 335.5.[28] The plaintiff forced payment entirely from the defendant bus company *after* the statute was passed, and the defendant bus company sought contribution against the defendant truck owner. The court held that the legislature did not intend for the statute to apply retroactively and refused contribution. In its decision the court observed:

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[26] *Id.* at 665. The court, discussing the rule, observed:

> In addition to being balked by Rule 14 (a), the appellant's theory that there can be no contribution unless the plaintiff has first obtained a judgment against both wrongdoers is untenable for still another reason. The right to seek contribution belongs to the tort-feasor who has been forced to pay, and the existence of the right cannot logically depend upon a selection of defendants made by the plaintiff. If it did so depend, the caprice or whim of the plaintiff, or his deliberate intention to fasten liability on one defendant alone, could preclude that defendant from having contribution to which he might otherwise be entitled. Moreover, such an application of the contribution doctrine would open the way to collusion between a plaintiff, and one against whom he has a cause of action, to impose liability solely upon another against whom he has a cause of action for the same wrong.
>
> For these reasons, we see no substance in the suggestion that contribution between concurrent tort-feasors can be enforced only if both are judgment debtors of the plaintiff.
>
> . . . .
>
> Due to the brevity of the report and a misleading headnote, the Merryweather case has often been cited in support of the sweeping proposition that no contribution can be had between joint tort-feasors. It is plain, however, that the ruling of the case was limited to the denial of contribution between wilful or intentional wrongdoers.
>
> Nevertheless, after a period of adherence to the true Merryweather holding, the majority of American courts have long flatly said that there can be no contribution between joint or concurrent tort-feasors, without distinguishing between those who are intentional wrongdoers and those whose unpurposed negligence results in a tort.
>
> Widespread revulsion against that rule, which Chief Justice Groner said "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled," was demonstrated when the legislatures of some fifteen states enacted alleviating statutes in one form or another. Dissatisfaction with the rule is further shown by the fact that many courts have 'riddled it with exceptions.' [*Id.* at 666 (footnotes omitted).]

[27] 225 Miss. 94, 82 So. 2d 705 (1955).

[28] MISS. CODE ANN. § 335.5 (1956), *see* app. 1, *infra*.

> Before Chap. 259 was passed, there was in Mississippi no right in joint tort feasors to obtain contribution between themselves. . . . Although this might be regarded as an exception to the general rule allowing contribution, we think that this principle, *irrespective of its merits or defects if it were being considered as an original question,* was a part of the substantive law of the state prior to the passage of Chap. 259. . . . The effect of the statute was to create rights which did not exist before. And it destroyed a valid defense to an action available before the enactment of the statute. . . . It took away a substantive right, a valid defense, and created a right in a joint tort feasor who had paid the entire judgment.[29] (Emphasis added.)

One wonders whether or not the supreme court intended to leave the principle open to debate if it were directly attacked and "being considered as an original question." Nevertheless, it has not been considered as an "original question," since the *Klaas* decision and other supreme court decisions have simply affirmed the common law rule.

In *Thomas v. Rounds*[30] an ambulance belonging to Thomas and driven by his employee was involved in a collision, causing injury to the plaintiff. Thomas complained that the judgment was entered only against him and not against his servant, the ambulance driver, who was a joint defendant. The court held:

> Tort-feasors are jointly and severally liable, and are not entitled to contribution between themselves.[31]

In *Mississippi Cent. Ry. v. Roberts*[32] a wrongful death action was brought against the railroad and a school bus driver for injury and death of bus passengers caused by a collision at the railroad crossing. The jury verdict sought to apportion damage between the railroad and the bus driver. The court refused to accept the apportionment. The jury again retired and returned a joint verdict. The defendant railroad objected to the acceptance of the joint verdict and moved for a mistrial. The supreme court affirmed the joint verdict, stating:

> We have already stated that the facts reasonably interpreted in the light of the verdict disclose a case of concurrent negligence on the part of both defendants, and it has long been the settled substantive law that, in such cases, when the concurrent negli-

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[29] Klaas v. Continental Southern Lines, Inc., 225 Miss. 94, 82 So. 2d 705 (1955).

[30] 161 Miss. 713, 137 So. 894 (1931).

[31] *Id.* at 718, 137 So. at 894.

[32] 173 Miss. 487, 160 So. 604 (1935).

> gence produces a single, indivisible injury, both the defendant tort-feasors are equally liable for the entire damage sustained. In the absence of a statute expressly so authorizing, there is no apportionment or contribution between them.[33]

In *Teche Lines, Inc. v. Pope*[34] a passenger filed suit against a railroad and bus company for injuries sustained in a train-bus collision at the railroad crossing. The court granted a peremptory instruction for the railroad and a verdict was entered against the bus company. The greatest portion of the bus company's argument on appeal was directed at the action of the court in granting a peremptory instruction for the railroad. The court held:

> The railroad company was made a joint defendant and the greater part of the argument of appellant is directed at the alleged error of the trial court in granting a peremptory instruction in behalf of the railroad company. If there were any error in that respect, the plaintiff, appellee, only would be entitled to complain of it. Even if the railroad company were liable, it would be as a joint tort-feasor, and it is firmly settled in this state that joint tortfeasors are equally liable and that there is no apportionment or contribution between them.[35]

Of course, the federal courts in Mississippi have necessarily followed the rule. In *Gulf & S.I. Ry. v. Gulf Refining Co.*[36] a wrongful death action was filed originally against Gulf Refining Co. and the railroad on the basis that the defendants mistakenly shipped a drum of gasoline to certain parties who had ordered kerosene. Supposing the gasoline to be kerosene, the plaintiffs used the fuel for illuminating purposes; the gasoline caused an explosion, killing two persons. Before trial the oil company was dismissed; a verdict against the railroad was returned. The railroad filed an action against Gulf Refining Co. for "indemnity and contribution." The court, refusing to permit contribution, stated:

> Where a party wronged has compelled any one of the parties chargeable with the act to compensate him for the injury, the general rule is that the person thus singled out and compelled to bear the loss cannot recover against the others equally liable. . . .
>
> [W]here the negligence of the parties has been of the same character no indemnity or contribution will be allowed.[37]

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[33] *Id.* at 505-06, 160 So. at 606-07.

[34] 175 Miss. 393, 166 So. 539 (1936).

[35] *Id.* at 401-02, 166 So. at 541.

[36] 260 F. 262 (S.D. Miss. 1919). *See also* Standard Oil Co. of Ky. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

[37] 260 F. at 265.

VI. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

In 1939 the Commissioners on Uniform Laws responded to nationwide problems involving contribution among tortfeasors with a Uniform Act.[38] The original Uniform Contribution Among Tortfeasors Act of 1939 was revised in 1955 and designated:

> An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.[39]

The commissioners note explains that a primary purpose of the revision of the 1939 Act was to eliminate the definition of "joint tortfeasors."[40] That term is no longer used. This was done to eliminate possible confusion arising from the fact that in some jurisdictions the term "joint tortfeasors" refers only to those who can be joined as defendants in an action.

The 1955 Revised Act also states that an action for contribution must be brought within one year after final judgment is obtained against the party seeking contribution.[41] In the absence of such judgment, the right of contribution is barred unless the tortfeasor seeking contribution (1) has discharged by payment the common liability within the statute of limitations applicable to the claimant's cause of action or the statute of limitations applicable to the claimant's cause of action or (2) agreed while action was pending to discharge the liability and has begun action for contribution within one year of the agreement.[42]

It is noteworthy that the first paragraph of both the original act and revised act eliminates the "joint judgment" limitation of the Mississippi Act:

> [T]here is a right of contribution among them even though judgment has not been recovered against all or any of them.[43]

It must be remembered that the essential prerequisite to the right of contribution is that it ". . . exists only in favor of a tortfeasor who has paid more than his pro-rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share."[44]

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[38] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 version), 9 U.L.A. 233 (1957).

[39] UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 version), 9 U.L.A. 127 (Supp. 1967).

[40] *Id.* § 1, Commissioners' Note.

[41] *Id.* § 3 (c).

[42] *Id.* § 3 (d).

[43] *Id.* § 1 (a).

The Revised Act denies the right of contribution to any tortfeasor who has intentionally (wilfully or wantonly) caused or contributed to an injury or wrongful death.[45]

It also specifies that the liability insurer of a joint tortfeasor may be subrogated to the insured's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro-rata share of the common liability.[46] The Act provides that the action will not extend to breaches of trust or of other fiduciary obligations.[47]

Section 2 provides for enforcement of the right of contribution in the original action in which the common liability is fixed or by separate action. Since Mississippi law does not presently permit third party practice, the "separate action" procedure would be the only remedy available even if the Uniform Act were adopted. At present, the third party practice of the federal courts is useless in a contribution case, since the substantive law of Mississippi does not permit that right. Hopefully, Mississippi will soon adopt a third party practice. Although some delay in trial is caused when a defendant is permitted to file a third party claim, a multiplicity of actions could be avoided, thereby minimizing the tendency to further congest trial dockets. This post judgment procedure in the Uniform Act is based upon the New York Statute. The Commissioners observe that it appears to have worked very well, and no serious objection has developed. The Commissioners note that it seems consistent with good practice to authorize contribution problems to be tried out, after adjudication of the plaintiff's claim, among the defendants over whom the court has acquired jurisdiction in the original action.[48]

One of the most troublesome areas of contribution remedies is the effect of a release or covenant not to sue as it relates to three relationships: plaintiff to the tortfeasor in settlement, plaintiff to remaining tortfeasors, and as between tortfeasors. Sections 4 and 5 of the 1939 Act described the effects of a release. In the commissioners' note for the 1955 Act, it was observed that section 5 of the 1939 Act provided that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for reduction "to the extent of the pro-rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes of complaint and one of the main objections to its adoption where the Act has been adopted. The purpose of section 5 of the 1939 Act was to discharge collusion between the plaintiff and a released tortfeasor against the one not released. However, the effect of that provision was to discourage settlements. The commissioners observed:

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[44] *Id.* § 1 (b).
[45] *Id.* § 1 (c).
[46] *Id.* § 1 (e).
[47] *Id.* § 1 (g).
[48] *Id.* § 2, Commissioners' Note.

> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution.[49]

VII. Conclusion

It is apparent that a policy of unlimited contribution among tortfeasors is not without problems, particularly with regard to procedure for enforcement. However, the inequities of the common law rule demand a change. Whenever a court or legislative body is confronted with a proposal to abolish or radically modify a long standing rule of law, it must understandably move with caution. Nevertheless, the principles of natural justice should be the controlling factors. The general rule permitting contribution among joint obligors is the epitome of natural justice. There is no reason to exempt one wrongdoer and oppressively burden another at the whim or caprice of the plaintiff simply because tort liability, as contrasted with general obligations, is involved.

It is unlikely that the Mississippi Supreme Court will have this issue presented as "an original question." Even then, the court would probably defer the matter to statutory alteration. The legislature should confront this problem with major statutory surgery in the form of the Uniform Contribution Among Tortfeasors Act. Jurisdictions throughout the country have recognized this problem and have dealt with it, occasionally by judicial decree, but more frequently by legislative enactment. Hopefully, our lawmakers will soon join this trend.

APPENDIX I

§ 335.5. Contribution between joint tort feasors.

In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tort feasors, the defendants against whom such a judgment is rendered shall share equally the obligation imposed by such judgment, and if one (1) of such defendants pays an amount greater than the total sum of the judgment divided by the number of defendants against whom the judgment was rendered, then the other defendants shall be jointly and severally liable to him for the amount so paid in excess of his proportionate part; provided that no defendant shall be liable to any other defendant for more than his proportionate share of the original judgment.

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[49] *Id.* § 4, Commissioners' Note.

Provided further, that in determining, for the purpose of the above contribution, the number of defendants against whom the judgment has been rendered, an employer and his employee, or a principal and his agent, shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or commission of his employee or agent.

Provided further, that the liability of such defendants against whom such a judgment has been rendered shall be joint and several as to the plaintiff in whose favor such judgment has been rendered.

APPENDIX II

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.

1955 REVISED ACT

Sec.
1. Right to Contribution.
2. Pro Rata Shares.
3. Enforcement.
4. Release or Covenant Not to Sue.
5. Uniformity of Interpretation.
6. Short Title.
7. Severability.
8. Repeal.
9. Time of Taking Effect.

Be it enacted ....

§ 1. **[Right to Contribution].**—(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.

§ 2. **[Pro Rata Shares].**—In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

§ 3. **[Enforcement].**—(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

§ 4. **[Release or Covenant Not to Sue].**—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

§ 5. **[Uniformity of Interpretation].**—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

§ 6. **[Short Title].**—This Act may be cited as the Uniform Contribution Among Tortfeasors Act.

§ 7. **[Severability].**—If any provision of this Act or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

§ 8. **[Repeal].**—All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

STUDENT COMMENTS

EQUAL MUNICIPAL SERVICES FOR THE OTHER SIDE OF THE TRACKS

INTRODUCTION

The impetus of equality must blindly travel down every road in every community.

Most people are conscious of a neighborhood in their city or community characterized as "the other side of the tracks."[1] It may be a large urban ghetto or a cluster of shanty houses in a small town. Such areas are often easily identified by poor social conditions. The environment may consist of poverty, ignorance, disease, crime, unemployment, despair, and humiliation.

A town or city cannot eliminate all the social problems in impoverished areas, but what is the legal duty of a municipality to provide equal services[2] to *all* residential areas? People do not always receive the services to which they are entitled in a democracy. Poor and racial minority residents are often invisible to public officials, both visually and politically.

An enormous gulf in communications prevails between local officials and these residents; it perpetuates a sense of powerlessness in their communities. Citizens are profoundly isolated and alienated from the processes and programs of government.[3] Recent history vividly demonstrates the disaster that can result from such alienation. The frustration of unresolved grievances by ghetto residents against local authorities foreshadowed the urban violence in the summer of 1967.[4] Residents had little confidence in the willingness and ability of local government to respond to their grievances.[5]

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[1] Circuit Judge Tuttle, in Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) observed that "[r]eferring to a portion of town or a segment of society as being 'on the other side of the tracks' has for too long been a familiar expression to most Americans." 437 F.2d at 1287. The *Shaw* decision, a service equalization suit, is discussed throughout this Comment.

[2] "Municipal services" in this Comment includes benefits generally conferred on municipal residents without regard to a user tax or special assessment, such as street and sidewalk paving, street lighting, sanitation service, and police and fire protection.

[3] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 148-49 (1968).

[4] *Id.* at 147.

[5] *Id.*

City officials have broad administrative discretion in the distribution of vital services. Although the municipality has an interest in providing services to all its citizens for reasons of health, safety, and general welfare, municipalities often fail in this duty. When the failure affects a particular class of citizens, however, the issue is removed from the realm of administrative responsibility of the municipality and propelled into the courts.

The problem of the inadequacy of municipal services encompasses more than the narrow issue of living on unpaved, improperly lighted streets and receiving insufficient sanitation service, police and fire protection. It is a complex of legal, ethnic, economic, and social problems which permeate modern society. These problems cannot be resolved exclusively in the courts, but the law can serve as a viable force to encourage solutions and, at least, insure equality in the provision of services.

Expansion of equal protection to municipal services has created a new egalitarian frontier for disadvantaged persons. This Comment will explore the emergence of the right to equal services and the judicial dimensions of that right.

I. HAWKINS v. TOWN OF SHAW:[6] A NEW ASSAULT ON INEQUALITY

Hawkins v. Town of Shaw emerges as a landmark decision in attacks on racial discrimination. Establishing a precedent for future municipal service equalization suits, the Fifth Circuit Court of Appeals found that the town of Shaw had discriminated against its black residents in the provision of street paving, sewers, water mains, fire hydrants, and street lights. Injunctive relief was ordered to eliminate the disparities between the black and white residents.

The town of Shaw, Mississippi, is located in the Mississippi Delta and has a population of approximately 2500 persons. Black residents compose sixty percent of the population. Residential racial segregation is almost total. Only three percent of the black homes are located in white neighborhoods. Revealing a definite pattern of inferior services in the black neighborhoods of Shaw, the plaintiffs' statistics were extremely convincing. At the time of trial almost ninety-eight percent of the homes that fronted on unpaved streets were occupied by blacks; only three percent of the white residents lived on unpaved streets.

Ninety-nine percent of the white community were served by a sanitary sewer system, while twenty percent of the black residents were unserved entirely. The white residents were provided underground storm sewers and a continuous system of drainage ditches for surface water drainage; black neighborhoods had only a poorly maintained system of drainage ditches or none at all.

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[6] 437 F.2d 1286 (5th Cir. 1971).

The white community was favorably provided a disproportionate percentage of the street light fixtures, but more importantly they received all of the modern mercury vapor street lights. Seventy-seven percent of the street lights in the white neighborhoods were the modern type, while not a single new fixture had been installed in a black neighborhood. There was no aberration of this pattern in the provision of traffic control signs, adequate water mains, and fire hydrants; white residents were consistently favored.

The conditions in Shaw confronted the court with the issue of whether to condemn such degrading inequalities in the provision of municipal services. After an independent appraisal of the evidentiary effects of racial discrimination in Shaw, the Fifth Circuit reversed the district court's dismissal of the complaint and ordered relief for Shaw's black residents. The court's application of the fourteenth amendment's equal protection clause covers essentially any municipal service financed by general revenues. Although not an issue in *Shaw*, suits in larger cities will probably involve disparities in such traditional services as sanitation collection and police and fire protection.

Hawkins v. Town of Shaw is the center of a whole constellation of constitutional issues relating to the appropriate standard of equal protection review, bases of discrimination, statistical proof, discriminatory intent, and relief. The impact of *Shaw* cannot yet be determined, but it is certain to be a historical precedent. Cases which descend from *Shaw* will inevitably attempt to broaden its dimensions and formulate a solid, coherent approach for equalizing municipal services in all towns and cities.

II. STANDARDS OF EQUAL PROTECTION REVIEW

The unequal provision of municipal services produces an "under-inclusive" classification by denying one class of persons the same benefits as those similarly situated.[7] Judicial scrutiny of under-inclusive classifications embraces a dual standard of equal protection review. Justification for the unequal treatment of persons similarly situated must satisfy a requisite judicial standard, but determination and application of the appropriate standard is often an enigma to the courts. The compositions, justifications, and limits of the two approaches[8] promulgated by the Supreme Court are different. Judicial review of equal protection cases under the *traditional standard* is limited and restrained. Conversely, the *strict standard* of review is more active and protective of personal rights. The question of which standard to apply in municipal service equalization suits is a critical issue, and the choice made by the courts will determine the future of such suits.

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[7] *See* Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 348 (1949).

A. The Traditional Standard

Permitting unequal treatment of persons under the traditional standard, the courts require that "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[9] The courts attempt to balance legislative freedom and equality. The traditional standard sacrifices some equality and fairness[10] as illustrated by Professors Tussman and tenBroek in their classic analysis on equal protection:

> The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a *doctrine of reasonable classification.*
>
> [T]he Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.[11] (Emphasis added.)

The Supreme Court has consistently applied the traditional standard to equal protection claims involving economic and regulatory matters,[12] but there is no similar history of its application to personal rights. In each of these cases the Court upheld the challenged state economic regulation.[13] *Morey v. Doud*[14] is the only case since the 1930's in which the Supreme Court invalidated a business regulation under the equal protection clause of the fourteenth amendment.[15] Such a historical background of judicial restraint in the traditional approach suggests a policy of constitutionally permitting substantially all economic and regulatory action by state and local governments. The traditional approach does not require strict scrutiny of a municipality's conduct. It would permit any conduct that classified or distinguished among the residents, provided that such conduct be *rationally* related to a legitimate governmental objective. The danger of its application to municipal service equalization suits is evidenced by the district court's erroneous application in *Hawkins v. Town of Shaw.* Dismissing the complaint, the court stated:

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[8] The two approaches to equal protection scrutiny have been distinguished by various names such as the reasonable classification doctrine and the "suspect" classification doctrine, the permissive approach and the restrictive approach, restrained review and active review, and even the old standard and the new standard. This Comment will refer to the approaches as the traditional standard and the strict standard.

[9] F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[10] Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1086 (1969).

[11] Tussman and tenBroek, *The Equal Protection of the Laws, supra* note 7, at 344.

> If actions of public officials are shown to have rested upon *rational considerations,* irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review. Persons or groups who are treated differently must be shown to be similarly situated and their unequal treatment demonstrated to be *without any rational basis* or based upon an invidious factor such as race.[16] (Emphasis added.)

Although confronted with undisputed statistical evidence of racial disparity, the above statement by the district court illustrates that a court will go far in allowing a classification to stand by attributing it to at least a conceivable purpose, though perhaps not the most probable.[17] The degree of justification for inequality will depend upon the court's "imaginative powers and its devotion to a theory of judicial

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[12] *See, e.g.,* Martin v. Walton, 368 U.S. 25 (1961) (per curiam) (attorneys maintaining out-of-state offices); McGowan v. Maryland, 366 U.S. 420 (1961) (sale of certain goods on Sunday); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (opticians); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949) (operation of undertaking business); REA v. New York, 336 U.S. 106 (1949) (advertising vehicles); Goesaert v. Cleary, 335 U.S. 464 (1948) (women bartenders); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (river pilots).

[13] Cases cited note 12 *supra.*

[14] 354 U.S. 457 (1957) (selling money orders).

[15] Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. Rev. 716, 722 (1969) [hereinafter cited as Karst].

[16] Hawkins v. Town of Shaw, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969), *rev'd,* 437 F.2d 1286 (5th Cir. 1971).

[17] Note, *Developments in the Law—Equal Protection, supra* note 10, at 1080.

restraint."[18] The district court in *Shaw* justified the disparities by a finding of "rational considerations" inferred from "legitimate deductions,"[19] thus purporting to satisfy the traditional standard of equal protection. By applying the traditional standard the court erroneously applied a standard consistently used in economic regulation cases[20] and erroneously placed the burden upon the plaintiffs to demonstrate that the unequal treatment was "without any rational basis."[21]

B. The Strict Standard

Constitutional justification for racial or economic status classifications demands more than a "reasonable basis" as required by the traditional standard of equal protection review. Recognizing the need for application of the strict standard in *Hawkins v. Town of Shaw,* the Fifth Circuit Court of Appeals reversed the district court's dismissal and undertook an independent appraisal of the evidence adduced at the trial level.

The strict standard of review for equal protection claims has developed two branches: (1) classifications based on "suspect" criteria, such as race or wealth and (2) classifications which infringe upon "fundamental" rights. Judicial review under either branch subjects classifications "to the most rigid scrutiny"[22] and requires more than a mere demonstration of a rational relationship between the classification and some legitimate state purpose. The strict standard demands "a very heavy burden of justification"[23] and imposes upon the state the burden of demonstrating "a compelling governmental interest."[24]

1. *Suspect Classifications.* Racial[25] and economic[26] distinctions are the only clear and continuously recited "suspect" classifications. Distinctions involving lineage,[27] residency,[28] disadvantaged political minori-

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[18] *Id.*

[19] 303 F. Supp. at 1168.

[20] *See* cases cited note 12 *supra.*

[21] 303 F. Supp. at 1168.

[22] Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (classification infringing on a "fundamental" right); Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification based on a "suspect" criterion).

[23] Loving v. Virginia, 388 U.S. 1, 9 (1967).

[24] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[25] *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944).

[26] *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[27] Levy v. Louisiana, 391 U.S. 68 (1968).

[28] Shapiro v. Thompson, 394 U.S. 618 (1969).

ties,[29] members of the armed forces,[30] women,[31] students,[32] and minor children[33] have received special attention by the Court, but not always rigid judicial scrutiny. The great solicitude of the courts has been for racial minorities and the poor because of their susceptibility to oppression and abuse. Judge J. Skelly Wright in *Hobsen v. Hansen,*[34] persuasively explained the necessity of the suspect branch of the strict standard:

> [The] additional scrutiny of practices which . . . fall harshly on [disadvantaged] groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interest. This confidence is often misplaced when the vital interest of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of . . . judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.[35]

The intensity of judicial scrutiny for racial classifications has been perpetually rigid. Five years after passage of the fourteenth amendment, the Supreme Court emphasized that state-imposed racial discrimination "was the evil to be remedied" by the equal protection clause.[36] In 1886 a leading case, *Yick Wo v. Hopkins,*[37] held that the unequal and unjustified application of a city ordinance by public officials denied Chinese aliens equal protection of the laws. The ordinance was not unconstitutional per se, but became so in its application to a particular racial group.[38]

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[29] Williams v. Rhodes, 393 U.S. 23 (1968).

[30] Carrington v. Rash, 380 U.S. 89 (1965).

[31] Reed v. Reed, 92 S.Ct. 251 (1971); Goesaert v. Cleary, 335 U.S. 464 (1948). U.S. 464 (1948).

[32] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[33] *In re* Gault, 387 U.S. 1 (1967).

[34] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[35] *Id.* at 507-08.

[36] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81-82 (1873). More recently, *see* Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

[37] 118 U.S. 356 (1886).

[38] *Id.* at 373.

Chief Justice Stone foreshadowed the suspect branch of the strict standard of review in his famous "footnote four" in *United States v. Carolene Products Co.*[39] He announced that classifications resulting from "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."[40] *Korematsu v. United States*[41] in 1944 firmly established that racial classifications are "immediately suspect" and subject "to the most rigid scrutiny."[42] Recent Supreme Court decisions have continuously acknowledged and echoed this theme in equal protection claims based on race.[43]

In *Hawkins v. Town of Shaw* the complaint alleged discrimination on the basis of race and poverty, but on appeal the poverty discrimination argument was abandoned.[44] The propriety of an economic status suit, however, is supported by tenable authority. The inclusion of wealth as a suspect classification has been described as "[t]he new status of indigence . . . [reflecting] the turning of America's conscience from the narrow problems of Negro rights to a wider recognition of the disadvantaged position of the poor of all races."[45] Justice Jackson in *Edwards v. California*[46] recognized the invidious classification founded upon wealth in his concurring opinion. His concurrence based on the fourteenth amendment, Justice Jackson stated:

> [A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without

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[39] 304 U.S. 144 (1938).

[40] *Id.* at 152 n. 4.

[41] 323 U.S. 214 (1944).

[42] *Id.* at 216.

[43] *E.g.,* Loving v. Virginia, 388 U.S. 1 (1967), wherein the Court observed that racial classifications are not entirely forbidden, but must be justified by some "legitimate overriding purpose" independent of race. The racial distinction is required to be supported by more than a mere rational connection to the alleged purpose. *Id.* at 11.

McLaughlin v. Florida, 379 U.S. 184 (1964) declared:

> [A state law which classifies persons by race] even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196.

[44] 437 F.2d at 1287 n. 1.

[45] *The Supreme Court, 1965 Term,* 80 HARV. L. REV. 91, 180 (1966).

[46] 314 U.S. 160 (1941). The majority opinion in *Edwards,* based on the commerce clause, held that a state's police power did not permit it to exclude indigent immigrants from the state.

> funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.[47]

In *Skinner v. Oklahoma*[48] Justice Douglas explicitly began to lay the doctrinal foundation for the new egalitarian basis in constitutional law.[49] Although not a classification based expressly on wealth, the Court held invalid a state sterilization law for persons convicted three times for specific crimes, exempting white-collar crimes. The law made "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[50]

In the area of criminal law, the Court has held that a person's rights and claim to equal protection of the laws cannot be predicated on his financial ability to pay for justice and equality.[51] *Harper v. Virginia Board of Elections,*[52] declaring the poll tax unconstitutional, became "the first case outside the criminal area to place indigency on a level with race as a closely protected category under the equal protection clause."[53] It is now clear that "lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored"[54] and subject to the strict standard of equal protection review.

The foregoing discussion illustrates that the current state of the law is ripe for municipal service equalization suits based on racial and economic discrimination. Sub-standard provision of municipal services is not limited to racial minorities. Poverty is colorblind. Future service equalization suits should give economic status independent recognition in the courts.[55] The initial suits in this new area, however, will probably be more successful with the racial discrimination argument. Two reasons support this prediction. First, as a suspect classification, race has a longer and more incandescent history of special judicial scrutiny and intervention. Secondly, it is easier to prove discrimination based on the color of a man's skin than that based on the amount of money in his pockets.

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[47] *Id.* at 184-85.

[48] 316 U.S. 535 (1942).

[49] Karst, *supra* note 15, at 735.

[50] 316 U.S. at 541.

[51] *E.g.,* Tate v. Short, 401 U.S. 395 (1971), held that a state statute which permitted conversion of a fine to imprisonment for persons willing but unable to pay, while limiting punishment to payment of a fine for persons able to pay, violated the equal protection clause; Douglas v. California, 372 U.S. 353 (1963), required states to provide counsel for an indigent appealing his case; Griffin v. Illinois, 351 U.S. 12 (1956), required states to provide a free transcript to indigent criminal defendants seeking an appeal.

[52] 383 U.S. 663 (1966).

[53] *The Supreme Court, 1965 Term, supra* note 45, at 178.

[54] Harper v. Virginia Bd. of Elections, 383 U.S. at 668.

[55] Abascal, *Municipal Services and Equal Protection: Variations On A Theme By Griffin v. Illinois,* 20 Hastings L. J. 1367, 1383 (1969).

2. *Fundamental Rights.* The second branch of the strict standard requires that state action impairing "fundamental" rights also be subjected to rigid scrutiny and demonstrate some compelling state interest as justification. Rights[56] which have received special attention under the equal protection clause include procreation,[57] marriage,[58] divorce,[59] fairness in the criminal process,[60] equal education,[61] voting,[62] interstate travel,[63] and an illegitimate child's right to wrongful death damages for the mother.[64] The Court has no general formula for defining rights as "fundamental."[65] Cases are treated on an ad hoc basis, but each usually involves some possibility of detriment to the complaining party.[66] Detriment may occur when an individual is not treated equally with others, or detriment may occur if his treatment falls below an absolute, minimal standard.[67] "The selection [of fundamental interests] to date has been largely . . . interests that carry high priorities for the development of the nation's undeveloped sectors."[68]

Skinner v. Oklahoma[69] represents the innovational foundation for the fundamental rights branch of the strict standard. This development has been described as:

> [A] classification that discriminates with respect to a right of very great importance is not to be sustained merely because the classification has a rational basis; if the state fails to supply a

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[56] Other rights not included in the list are protected by other provisions of the Constitution. *See* Note, *Developments in the Law—Equal Protection, supra* note 10, at 1128.

[57] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[58] Loving v. Virginia, 388 U.S. 1 (1967).

[59] Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (Douglas, J., concurring).

[60] *E.g.,* Griffin v. Illinois, 351 U.S. 12 (1956).

[61] *E.g.,* Brown v. Board of Education, 347 U.S. 483 (1954).

[62] *E.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).

[63] Shapiro v. Thompson, 394 U.S. 618 (1969).

[64] Levy v. Louisiana, 391 U.S. 68 (1968).

[65] Note, *Development in the Law—Equal Protection, supra* note 10, at 1130.

[66] *Id.*

[67] *Id.*

[68] Karst and Horowitz, *Reitman v. Mulkey: A Telophase of Substantative Equal Protection,* 1967 SUP. CT. REV. 39, 58.

[69] 316 U.S. 535 (1942). Justice Douglas described the right to procreation as "one of the basic rights of man," and a classification that subjects certain persons to sterilization requires strict scrutiny by the courts.

> substantial justification, its discrimination is invidious and unconstitutional.[70]

Recent cases suggest that "the doctrinal seed planted nearly three decades ago in *Skinner* has come to full flower. And each new flowering provides seeds for the future."[71] There are still undefined areas in the amorphous category of fundamental rights.

Is the provision of municipal services or, at least, the *equal* provision of services by a municipality a fundamental right? One analogy can be made to school desegregation cases involving municipal educational facilities. Considering equal protection principles established in these cases,

> [i]t need only be asked whether dirty, filthy streets, unlit at night, beckoning the criminal, awash during winter storms, engender in those who live in such under-serviced areas "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [Citing *Brown v. Board of Education,* 347 U.S. 483, 494 (1954).][72]

Living in a democracy should entitle all persons to certain basic protections and provisions. Police and fire protection are vitally important to the preservation of life and property. Adequate streets, street lights, sewers, and fire hydrants are similarly important. The inadequacy of these and other services immediately creates an environment of health and safety hazards. Any provision of unequal or inferior services which may result in the serious loss of "life, liberty, or property" should precipitate strict scrutiny by the courts.[73] In *Shapiro v. Thompson*[74] the Supreme Court observed that the welfare residency requirement, which violated the equal protection clause, denied the plaintiffs "food, shelter, and other necessities of life."[75] Fundamental fairness demands broad application of the *Brown v. Board of Education* principle to municipal services.

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[70] Karst, *supra* note 15, at 735.

[71] *Id.* at 736. *See generally* Shapiro v. Thompson, 394 U.S. 618 (1969), and Levy v. Louisiana, 391 U.S. 68 (1968), for cases which represent the flowering of this concept.

[72] Abascal, *Municipal Services and Equal Protection: Variations On A Theme By Griffin v. Illinois, supra* note 55, at 1388.

[73] Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services,* 4 Harv. Civ. Rights—Civ. Lib. L. Rev. 1, 19 (1968) [hereinafter cited as Ratner].

[74] 394 U.S. 618 (1969).

[75] *Id.* at 627.

A municipality is not constitutionally required to provide services. Just as the electoral process and the criminal process are provided and regulated by the government, however, municipal services have become basic governmental responsibilities.[76] The modern city dweller perceives these services as absolute necessities in a municipal environment. Once a municipality undertakes the provision of services, the equal distribution of those services becomes a fundamental right.[77]

A service equalization suit premised upon deprivation of fundamental rights approaches the issue of substantive due process.[78] Analogous to this topic is the "new property" concept for recipients of welfare benefits. No state is required to provide public assistance; but once the state establishes a welfare program, the "benefits are a matter of statutory entitlement for persons qualified to receive them."[79] Any infringement on a person's participation in the provision of vital governmental services must be carefully scrutinized by the courts. Scrutiny of municipal services as a new fundamental right should be conducted under the equal protection clause, not the due process clause. Equal protection will ostensibly encompass more rights articulated as fundamental.[80]

3. *Interaction of the Two Branches.*

> The more the victims of legislative classification appear to be disadvantaged, the less need there is for the interest to be basic. So also the judiciary can be expected to give "close scrutiny" to the alleged invasion of a right it regards as fundamental,

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[76] Ratner, *supra* note 73, at 22.

[77] *Cf.* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964). In *Griffin* the constitution and laws of Virginia provided a state system of public schools. The closing of a school in one county while maintaining schools in all other counties violated the equal protection clause.

[78] Fessler and Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 441, 463 (1971) [hereinafter cited as Fessler and Haar].

[79] Goldberg v. Kelly, 397 U.S. 254, 262 (1970). *See also* Boddie v. Connecticut, 401 U.S. 371 (1971). *Boddie* held that the due process clause of the fourteenth amendment required that indigents have *equal* access to divorce courts, which the state provided and monopolized, without requiring payment of court cost and fees.

[80] "Probably every interest found to be fundamental and therefore protected by the due process clause will also be fundamental under the equal protection clause," however, the converse does not appear to be true. Some equal protection rights will not be regarded as fundamental under the due process clause. Note, *Developments in the Law—Equal Protection, supra* note 10 at 1130. "Reliance on equal protection rather than on due process would seem to open a wider range of activities to constitutional scrutiny." Note, *Discriminations Against the Poor and the Fourteenth Amendment,* 81 HARV. L. REV. 435, 438-39 (1967).

> even when the claimant's assertion that he is disadvantaged is less than persuasive.[81]

Both branches of the strict standard must be recognized independently in service equalization suits. As a classification becomes less invidious under a suspect criterion (*e.g.*, few blacks or poor persons) the need is greater for judicial recognition of municipal services as a fundamental right. Conversely, reluctance by the courts to acknowledge municipal services as fundamental will necessitate a strong demonstration of a suspect classification. A suit which alleges the presence of suspect criteria *and* the fundamental right to municipal services will be strengthened and probably evoke special scrutiny more easily. The vanguard of this proposition is represented by landmark cases[82] which appear to be based on both branches of the strict standard.

It should be noted, however, that the fundamental right and economic status approaches to the strict standard may employ recondite limitations. The Supreme Court can refuse to regard the equal provision of municipal services as a fundamental right, independently deserving strict review. In *Dandridge v. Williams*[83] the Court recently intimated that fundamental rights must be found in the Constitution.[84] Furthermore, a review of equal protection claims based on economic status will similarly reveal that the indigent plaintiffs were also subjected to an impairment of a constitutionally protected interest, or at least an interest that is "of the essence of a democratic society."[85] This pattern is reflected in the recent case of *Boddie v. Connecticut*,[86] wherein the Supreme Court avoided the equal protection clause in providing relief to poor persons when a constitutional right was not involved. The Court held that the due process clause of the fourteenth amendment, not the equal protection clause, required that indigents have free and equal access to divorce courts.[87] *Dandridge* and *Boddie* may limit expansion of service equalization suits on any independent basis other than race. Precedent, however, favors recognition of the expanding rights of the poor and equality in municipal services as a fundamental right, but the Supreme Court must ultimately proclaim the independence of these principles.

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[81] Karst, *supra* note 15, at 744-45.

[82] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (suspect criterion of wealth and fundamental right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (suspect criterion of wealth and fundamental right to vote). Interestingly, as an alleged fundamental right, education cases have also involved the racial element. Note, *Developments in the Law—Equal Protection, supra* note 10 at 1129.

[83] 397 U.S. 471 (1970).

[84] *Id.* at 484-86.

[85] Reynolds v. Sims, 377 U.S. 533, 555 (1964). *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

[86] 401 U.S. 371 (1971).

[87] *Id. See* cases cited note 79 *supra. See also* Shapiro v. Thompson, 394 U.S. 618, 659-63 (1969) (Harlan, J., dissenting). *But see* Boddie v. Connecticut, 401 U.S. 371, 383-89 (1969) (Douglas & Brennan, JJ., concurring).

III. Evidentiary Burdens

The construction of a prima facie case in future service equalization suits should compromise between precise proof of discrimination and unjustified municipal discretion. While the original burden of introducing evidence rests with the plaintiffs, a statistical demonstration of sufficient disparities should establish a prima facie case by removing the element of discrimination from mere speculation and bringing it within the realm of legitimate inference.[88] An evidentiary demonstration that municipal services are provided disproportionately to one class of residents presumes discriminatory practice and effect. The prima facie case shifts the evidentiary burden to the defendants and should not be defeated because of claims of municipal discretion or mere denials of discriminatory intent.[89] If the statistics are undisputed, the defendant municipality is required to show that its action and subsequent effects were brought about for reasons other than discrimination.[90] The court should be precluded from judicial "presumptions of regularity and constitutionality which would normally assist the defendant in the discharge of his burden of affirmative response."[91] The defendant's rebuttal must consist of positive proof.[92]

A. Statistical Evidence

As early as 1881 the Supreme Court emphatically acknowledged the establishment of a prima facie case of racial discrimination by statistical evidence.[93] In recent years the Court has insisted that evidence of statistical disparities be directly confronted by the defendant's proof.[94] Recognizing the use of statistics to demonstrate a prima facie case of racial discrimination in such areas as jury selection,[95] voter registration,[96] and education,[97] the Fifth Circuit Court of Appeals has noted that "figures speak and when they do, Courts listen."[98] If a plaintiff's "allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistable, tantamount for all practical purposes to a mathematical demonstration," that the municipality is engaged in racially discriminatory practices which deprive one class of residents of certain benefits and privileges.[99]

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[88] Fessler and Haar, *supra* note 78, at 447.

[89] *See* Labat v. Bennett, 365 F.2d 698, 719 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).

[90] *See* Patton v. Mississippi, 332 U.S. 463, 466 (1947).

[91] Fessler and Haar, *supra* note 78, at 448. In seeking to escape the inference of a prima facie case of racial discrimination in *Hawkins v. Town of Shaw,* the district court considered "all legitimate *deductions* to be made from the evidence running counter to statistical racial disparity." 303 F. Supp. at 1168 (emphasis added).

[92] *See* Whitus v. Georgia, 385 U.S. 545, 552 (1967).

[93] Neal v. Delaware, 103 U.S. 370, 397 (1881). *See* Patton v. Mississippi, 332 U.S. 463 (1947), for a leading Supreme Court precedent on the use of statistical evidence to prove racial discrimination.

Irrespective of race, the Supreme Court has enunciated the principle of statistical proof in the area of fundamental rights. Applying the equal protection clause to the legislative reapportionment case of *Reynolds v. Sims*,[100] the Court observed that "the resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically."[101]

Courts which intervene in the area of municipal services face the difficult problem of deciding standards of impermissible classifications and quantitative and qualitative levels of services. For example, a complaint alleging racial discrimination must establish two points simultaneously. First, the plaintiffs must demonstrate that they constitute a racially identifiable group; secondly, they must show that they receive an inferior quantity or quality of services. These points, not being entirely severable, must have a standard or perhaps separate standards by which to evaluate the claim. At what statistical point can the court determine that (1) a particular racial group is discriminated against and (2) the quantitative and qualitative levels of disparities are impermissible? Because of overwhelming numerical disparities, *Hawkins*

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[94] *E.g.*, Whitus v. Georgia, 385 U.S. 545, 552 (1967); Coleman v. Alabama, 389 U.S. 22, 23 (1967); Avery v. Georgia, 345 U.S. 559, 562-63 (1963).

[95] *E.g.*, Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

[96] *E.g.*, Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).

[97] *E.g.*, United States v. Board of Education of City of Bessemer, 396 F.2d 44 (5th Cir. 1968).

[98] Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

[99] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

[100] 377 U.S. 533 (1964).

[101] *Id.* at 563.

v. Town of Shaw represents an extreme situation and provides few concrete answers for courts in future suits.[102]

"Equality" within the context of quantitative and qualitative standards presents several problems. Will the courts seek a minimal standard of adequate services or the more ambitious standard of absolute equality?[103] The Fifth Circuit's opinion in *Shaw* suggests that a suit based on suspect criteria will require absolute equality in the provision of services, regardless of whether services in the favored communities are excessive or insufficient.[104] The *Shaw* decision does not mention a minimal standard of entitlement, but the need to determine the dimensions of such a standard may arise in a fundamental rights argument.[105] The minimal standard is also highly conducive to the argument that *many poor or black neighborhoods may require, not merely equal, but more services.*[106] Conditions in some neighborhoods, for example, necessitate more frequent garbage collection; high crime areas deserve more street lighting and police protection. The focal point of the minimal standard of entitlement is obviously "need."

Courts will be enlightened by other areas of civil rights litigation, but ultimately they must determine desirable standards for the purpose of ascertaining impermissible disparities and providing relief. Alternately, future service equalization suits may develop standards on an individual basis.

B. Discriminatory Intent

Inequality in the receipt of municipal services will generally not be the result of overt discrimination but will assume the form of benign neglect. Although several Supreme Court decisions have announced that administrative action denies equal protection only when intentionally discriminatory,[107] a number of decisions have found discrimination from criteria other than direct examination of motivation.[108] In *Yick Wo v. Hopkins*[109] a statistical pattern of unequal and oppressive administrative discretion created a legitimate inference of de facto racial discrimination.[110]

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[102] The problem at the lower end of the spectrum is illustrated by Swain v. Alabama, 380 U.S. 202 (1965). In a jury selection case, the Court held:

> [P]urposeful discrimination based on race alone is not satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10%. . . . The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specific number of Negroes. . . . We do not think that the burden of proof was carried by petitioner in this case. [*Id.* at 208-09.]

[103] Fessler and Haar, *supra* note 78, at 461.

[104] *Id.* at 462.

[105] *Id.* at 462-63.

[106] Ratner, *supra* note 73, at 42-43.

Proof of an actual intent to discriminate is no longer a tenable requirement in establishing a prima facie case. "It is not necessary to go so far as to establish ill will, evil motive, or absence of good faith" in future equal protection claims.[111] Municipal thoughtlessness and inaction coupled with a historical pattern of inferior services introduces a ground for heightened judicial concern.[112] Rather than explore intent or motive in service equalization suits, courts should review the unequal *effect* of municipal policies;[113] otherwise, de facto discriminatory conduct may sufficiently prevail.

C. *Compelling State Interest*

The presence of a prima facie case shifts the burden of proof to the defendants, and under the strict standard of review the defendants must demonstrate a *compelling* state interest as justification for an otherwise impermissible classification or distinction.[114] A classification that fails to demonstrate a compelling state interest constitutes an "invidious" discrimination against the persons affected.[115] A moderate amplification of this principle explains its balancing aspect:

> This higher burden [of proof] requires that a state show not only that its objective could not be attained by a measure

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[107] *See, e.g.,* Swain v. Alabama, 380 U.S. 202, 205 (1965); Snowdon v. Hughes, 321 U.S. 1, 8 (1944).

[108] Note, *Developments in the Law—Equal Protection, supra* note 10, at 1098.

[109] 118 U.S. 356 (1886).

[110] *Id.* at 373-74.

[111] United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 65 (5th Cir. 1962), *cert. denied,* 372 U.S. 915 (1963); *accord,* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[112] Fessler and Haar, *supra* note 78, at 460; *see e.g.,* Reitman v. Mulkey, 387 U.S. 369, 373 (1967); Norris v. Alabama, 294 U.S. 587, 596-98 (1935).

[113] *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956); Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). These two cases illustrate the discriminatory effect of "non-discriminatory" policies.

Similarly, in Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) and Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Supreme Court focused on the actual effect of legislative enactments, not upon the intent or motivation behind the enactments. *See* Palmer v. Thompson, 403 U.S. 217, 224-26 (1971).

[114] *E.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[115] *Id.* at 633.

> which did not draw [impermissible] distinctions, but also that the public interest involved outweighs the detriments that will be incurred by the affected private parties.[116]

The public interest of protection of the fisc,[117] administrative efficiency,[118] social goals[119] and safety[120] have failed to survive the heavy burden of justification. The scales are necessarily "balanced" in favor of those disadvantaged by the classification. Theoretically, a plethora of public necessity will dislodge the scales and shift the balance in favor of the municipality. Although not impossible, the task is extremely difficult.

Recognizing that justification for the extreme disparities in the town of Shaw was even more difficult, the Fifth Circuit "determined that no compelling state interests can possibly justify the discriminatory *results* of Shaw's administration of municipal services."[121]

D. *Special Problems*

The disparities in the town of Shaw were especially vulnerable to a service equalization suit because all municipal services were financed by general revenue. Many municipalities, however, finance local improvements such as the construction of streets and sewers by levying special assessments against the property benefited.[122] This policy requires only the property enjoying the benefit to bear the expense.[123] *Hawkins v. Town of Shaw* leaves this problem unresolved in municipalities which levy special assessments for specific services. Special assessments may ultimately be another manifestation of discrimination on the basis of wealth which poor persons simply cannot afford. This is especially true when the assessment is for only part of the cost or the municipality engages in a matching funds policy. In any event, the effect of an adverse court decision in this area may be limited in communities where most poor or black residents rent their homes. A special assessment is a charge against the land, not the tenant, and is generally secured by a lien on the property.[124]

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[116] Note, *Developments in the Law—Equal Protection, supra* note 10, at 1103.

[117] Palmer v. Thompson, 403 U.S. 217, 226 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

[118] Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969).

[119] *See* Levy v. Louisiana, 391 U.S. 68 (1968).

[120] Palmer v. Thompson, 403 U.S. 217, 226 (1971).

[121] Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971).

[122] 14 E. McQuillin, The Law of Municipal Corporations §§ 38.11, 38.12, 38.24 (3rd ed. 1970).

[123] *Id.* at § 38.11.

[124] *Id.* at §§ 38.08, 38.161.

Modifications of municipal policy which "freeze in" the results of past discrimination is another problem confronting the courts. A new policy, skillfully comprised of equality, providing services to all *new* sections of a municipality on a non-discriminatory basis is insufficient if it continues to underservice older, disfavored sections. Similarly, any new finance policy for municipal services that shifts the revenue source from the general fund to special assessments is unacceptable if its effect perpetuates discriminatory conditions.[125] The Fifth Circuit in *Hawkins v. Town of Shaw* stated:

> [A] relationship otherwise rational may be insufficient in itself to meet constitutional standards—if its effect is to freeze-in past discrimination.[126]

Courts have expressly rejected "neutral" policies, which apparently apply equally to everyone, but have the inevitable effect of cloaking injustices of the past with a shield of present rights.[127]

IV. RELIEF

A. Section 1983

It is an established principle that courts will not review municipal policy or discretion unless it appears unconstitutional, unreasonable, or unnecessarily oppressive. Except under these circumstances, it is the duty of the courts to uphold municipal enactments and judgments.[128] Since *Ex Parte Young*[129] suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the eleventh amendment. The Supreme Court has specifically declared that "the equal protection clause reaches the exercise of state power however manifested," including power exercised by cities, towns, or counties.[130]

The most obvious cause of action for a service equalization suit will be found in the Civil Rights Act of 1871.[131] Under 42 U.S.C. § 1983 any

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[125] Fessler and Haar, *supra* note 78, at 461.

[126] 437 F.2d at 1290 *citing* Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 688 (5th Cir. 1969).

[127] *See, e.g.,* United States v. Louisiana, 380 U.S. 145, 155-56 (1965); Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 688 (5th Cir. 1969), *cert. denied,* 396 U.S. 940 (1969).

[128] *See, e.g.,* Dalehite v. United States, 346 U.S. 15, 43 (1953); City of St. Paul v. Chicago, St. P., M. & O. Ry. Co., 413 F.2d 762, 767 (8th Cir. 1969), *cert. denied,* 396 U.S. 985 (1969). Botsford v. City of Norman, 354 F.2d 491, 494 (10th Cir. 1965).

[129] 209 U.S. 123 (1908).

[130] Avery v. Midland County, 390 U.S. 474, 479-80 (1968).

[131] 42 U.S.C. § 1983 (1964) provides:

Every person who, under color of any statute, ordinance, regulation, custom, person deprived of his constitutional rights by state or local officials has remedies available in federal court. A person may seek the federal remedy irrespective of the availability of a state remedy.[132] Section 1983 will effectively reach municipal officers acting within their official capacities, but many suits simultaneously seek to enjoin the municipality itself. The need for enjoining the municipal corporation is unclear, and even the propriety of a § 1983 suit against a city or town is unsettled.

In *Hawkins v. Town of Shaw* the plaintiffs joined the town as a defendant. The district court dismissed the town as a party, concluding that "injunctive relief was not obtainable against a municipal corporation under § 1983."[133] Reversing the district court, the Fifth Circuit enunciated that "[t]he Town of Shaw, indeed any town, is not immune to the mandates of the Constitution."[134]

In *Monroe v. Pape*[135] the Supreme Court refused to consider a municipality a "person" within the meaning of § 1983 in a suit for damages. This decision clearly leaves any alteration of municipal liability for damages in a § 1983 action to Congress[136] or future judicial interpretation.[137] Unlike *Monroe, Hawkins v. Town of Shaw* was a class action seeking injunctive relief. The Fifth Circuit[138] and other courts of appeals[139] have held that a municipality is a "person" under

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> or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[132] *E.g.,* McNeese v. Board of Education, 373 U.S. 668, 671-72 (1962); Monroe v. Pape, 365 U.S. 167, 173-74 (1961); Moreno v. Henckel, 431 F.2d 1299, 1305-07 (5th Cir. 1970).

[133] 303 F. Supp. at 1163 n. 1.

[134] 437 F.2d at 1292.

[135] 365 U.S. 167 (1961).

[136] Note, *The Municipality, Section 1983 and Pendent Jurisdiction,* 5 VAL. U. L. REV. 110, 112-13 (1970).

[137] The U.S. Court of Appeals for the District of Columbia recently held the District as a municipality liable for the torts of its policemen in a suit for damages under § 1983. The court interpreted the Supreme Court ruling in *Monroe v. Pape* as not permitting a § 1983 suit for damages against a municipality only when the municipality has been clothed in immunity by its parent state. Carter v. Carlson, 447 F.2d 358, 368-70 (D.C. Cir. 1971).

[138] *E.g.,* Moreno v. Henckel, 431 F.2d 1299, 1309 (5th Cir. 1970); Harkless v. Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970); *see* Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971); United States v. City of Jackson, 318 F.2d 1, 10-11 (5th Cir. 1963).

[139] *E.g.,* Garren v. City of Winston Salem, 439 F.2d 140 (4th Cir. 1971); Dailey v. City of Lawton, 425 F.2d 1037, 1038 (10th Cir. 1970); Schnell v. City of Chicago, 407

§ 1983 for the purpose of equitable relief. Although the Supreme Court has not expressly considered the issue, it has permitted relief under § 1983 against school districts and officials,[140] state prison wardens,[141] and state election officials[142] without any limitation of equitable remedies. The Court has also ordered declaratory and injunctive relief against municipalities in civil rights cases[143] without questioning the propriety of enjoining a municipality under § 1983. These cases tend to negate the town of Shaw's theory that absolute immunity is necessary to protect the municipal fisc from possible contempt fines for actions by public officials who may violate the injunctive relief granted by a court.[144]

Municipal immunity in law and equity under § 1983 will not obstruct effective redress of constitutional violations; municipal officials are expressly brought within the proscription of § 1983. In any event, the present weight of authority in several federal courts of appeals demonstrates that injunctive relief under § 1983 is available against a municipality as well as its officials.

B. *The Role of the Court*

Determining effective relief for plaintiffs in service equalization suits is a complex task that weighs heavily upon the institutional limitations of the courts. Judicial involvement in foreign areas is not novel. Although a certain presumption of competency in special areas should be given to certain bodies of government, courts cannot be excluded from difficult areas.[145] Once it is demonstrated that the Constitution

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F.2d 1084, 1086 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961); Sellers v. Johnson, 163 F.2d 877, 880, 883 (8th Cir. 1947), *cert. denied,* 332 U.S. 851 (1948).

Other courts of appeals have recognized the right to equitable relief against municipalities. *See e.g.,* Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970); Lewis v. City of Grand Rapids, 356 F.2d 276 (6th Cir. 1966), *cert. denied,* 385 U.S. 838 (1966); and numerous school desegregation cases.

[140] *E.g.,* Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969).

[141] *E.g.,* Rinaldi v. Yeager, 384 U.S. 305 (1966).

[142] *E.g.,* WMCA v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

[143] *See e.g.,* Watson v. City of Memphis, 373 U.S. 526 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962).

[144] Brief for Defendant-Appellee at 48, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

[145] Adhering to judicial policies advocated by the defendants in *Hawkins v. Town of Shaw,* the district court observed that "[municipal services] is a field in which courts should be reluctant to enter because of their incompetence." 303 F. Supp. at 1169.

has been violated, the courts should enter any area to provide relief. The school desegregation and legislative reapportionment cases illustrate judicial supervision in complex areas.[146]

The Fifth Circuit in *Hawkins v. Town of Shaw* respected the principles of federalism and separation of powers by directing the town to formulate a plan to eliminate the disparities in services "within a reasonable time."[147] Early judicial history had not authorized delays in vindication of constitutional rights, but the school desegregation cases injected this principle into the matter of relief.[148] Most familiar is the *Brown v. Board of Education* decree that school desegregation proceed "with all deliberate speed."[149] If municipalities act in good faith when ordered to formulate and implement service equalization plans, the propriety of judicial deference in this area is obvious. If the municipality fails to produce a satisfactory plan, the plaintiffs or the court must develop one.[150]

Development of a proper remedial plan by a municipality may create many problems. Among the most prevalent problems will be the municipality's financial ability to implement an equalization order. Without increased revenue, either from a tax increase or special state or federal assistance, a municipality may be financially incapable to extend services to newly developed areas, continue to repair and improve presently favored areas, and simultaneously equalize services in the disfavored areas. Courts may find it necessary to preclude a municipality from extending and improving services in new or favored areas until the disfavored areas are equalized. Such a decree should be exercised wisely and cautiously by the court, but it is a tenable remedy in financially burdened municipalities.

CONCLUSION

A major obstacle to future service equalization suits is the physical barrier of preparing a prima facie case, especially in medium and large cities. The high financial cost and many hours required to prepare a case may vitiate laudable efforts. It is virtually impossible to survey an entire large city to ascertain the quantitative and qualitative levels of services, as well as determine the ethnic and economic composition of every neighborhood and community. Compared with the town of Shaw, such an endeavor would be radically complex. Perhaps one solution is random sample proof for larger cities. Statisticians could insure the accuracy of probability in making the random samples and evaluate the comprehensive results.

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[146] Note, *Discriminations Against the Poor and the Fourteenth Amendment, supra* note 80, at 443.

[147] 437 F.2d at 1293.

[148] Note, *Developments in the Law—Equal Protection, supra* note 10, at 1137.

[149] 349 U.S. 294, 301 (1954).

[150] *See generally* Note, *Developments in the Law—Equal Protection, supra* note 10, at 1141-54.

The road toward elimination of the "other side of the tracks" has been a morass of inertia. The slow emergence of municipal service equalization actions may be attributed to several factors. Most people view the "other side of the tracks" as a perpetual fact of American life. The issue has not presented itself as a crisis demanding immediate attention. Unequal provision of municipal services is not a causal social problem, but rather a manifestation of the more demanding problems. Civil rights and legal aid attorneys have, therefore, concentrated their efforts on voting rights, school desegregation, welfare rights, job discrimination, and housing. While achievements in these areas will strengthen efforts to equalize services, the present inequality may persist for years. Denial of equal municipal services is a badge of slavery as surely as is denial of equal education or the right to vote.

Municipalities can no longer remain complacent toward underserviced areas. *Hawkins v. Town of Shaw* demonstrates the propriety of enforcing the right to equal services for disfavored residents. *Shaw* and its descendants may prompt a genuine crusade by municipalities to rectify policies of providing unequal services.

Kenneth W. Barton

EDITORS NOTE: *Hawkins v. Town of Shaw* (No. 29013) was granted a rehearing before the Fifth Circuit, and the case was argued en banc on October 19, 1971. No decision had been rendered when this comment went to press.

JUDICIAL SELECTION AND TENURE IN MISSISSIPPI

I

> *[In Mississippi] we do not in truth have a wholly elected judiciary but substantially an appointive one by the Governor, a political figure who has no assistance from the Bar Association or any other professional group nor any control by lawyer-oriented groups for these appointments.*[1]

Although the Mississippi Constitution of 1890 purportedly abolished gubernatorial or legislative appointment of judges by providing for their popular election, the Mississippi judiciary continues to be composed largely of individuals appointed by the governor to fill judicial vacancies. The *Report of the Mississippi Judiciary Commission to the 1970 Regular Session of the Legislature of the State of Mississippi* revealed that between the years 1948 and 1971 Mississippi governors filled 68 unexpired or newly created judgeships[2] under the authority of

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[1] REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI, at 66 [hereinafter cited as REPORT]. GEN. LAWS MISS. ch. 312 (1968) created the Mississippi Judiciary Commission and charged it with conducting ". . . a complete survey of the judicial system of Mississippi and . . . obtain[ing] statistical information with reference to case loads of the various courts in Mississippi; conduct[ing] research relating to improvement of the judicial system in the State . . . and [making] a comprehensive study of the judicial system . . . for the purpose of the improvement thereof. . . ." On January 6, 1970, the Commission's REPORT, containing the results of its survey and its recommendations for the improvement of the administration of justice in Mississippi, was submitted to the 1970 Regular Session of the Mississippi legislature. For a condensed version of the REPORT, *see* Payne, *Mississippi Judiciary Commission—A Synopsis,* 41 MISS. L.J. 22 (1969).

[2] REPORT, *supra* note 1, at 66. The 68 appointments breakdown as follows:

Term	Supreme Court	Circuit Court	Chancery Court	County Court	Total Appts.
1948-51	5	1	5	0	11
1952-55	2	1	8	5	16
1956-59	0	1	2	4	7
1960-63	3	4	5	0	12
1964-67	1	2	6	4	13
1968-71	0	3	3	3	9

These figures do not include special appointments during the disability of a sick or aging judge, which in most cases would give the candidate who has served as special judge a distinct advantage at the polls, almost as if he had been an incumbent. Glenn R. Winters, executive director of the American Judicature Society, has observed that "judges once appointed to office are almost invariably retained in office at the next election. In any election the incumbent has a heavy advantage, and especially an incumbent who has recently had the specific endorsement of the state's highest-ranking government official." Winters, *One-Man Judicial Selection,* 45 J. AM. JUD. SOC'Y 198, 199 (1962).

section 177 of the Mississippi Constitution of 1890.[3] The appointments of Chancellor R. P. Sugg to fill the unexpired term of the late Chief Justice William N. Ethridge and Mrs. Lenore Prather to fill Justice Sugg's vacated chancellorship are the most recent exercises of the governor's appointive powers.[4]

The incongruity of six governors appointing some seventy judges in a state that ostensibly demands that its judiciary be chosen by the electorate becomes ironic when it is considered that Mississippi was the first state in the Union to prescribe an elected, rather than an appointed, judiciary. The purpose of this comment is to trace the development of the methods of judicial selection from their English origins through their American variations, giving special emphasis to Mississippi methods and emerging merit-selection schemes.

II

> *Here or anywhere, it will probably be admitted that . . . the English judges of today are about the best currently produced by the Anglo-Saxon race or, for that matter, any race.*[5]

In his praise of the excellence of the modern English judiciary, Justice Garwood might have appropriately added the caveat "Good things take time," for England's systems of selecting the men who administer justice are the result of over 900 years of trial and error.

The British experience began with the political tenet that judicial powers were a characteristic of the sovereign. As the responsibilities of ruling became increasingly time consuming, more and more sovereign functions were entrusted to the royal clerks. As government grew the functions of the clerks became more particularized. The earliest features of bureaucracy emerged as the courts evolved into separate entities, but they remained the king's courts, and judges remained royal appointees dependent upon the sovereign for their official commissions. "The judges were appointed by the king, were removable at his will, their office terminated at his death, and the principle part of the emoluments of the offices were paid by him."[6]

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[3] "The governor shall have power to fill any vacancy which may happen during the recess of the senate in the office of judge or chancellor, by making a temporary appointment of an incumbent, which shall expire at the end of the next session of the senate, unless a successor shall be sooner appointed and confirmed by the senate. When a temporary appointment of a judge or chancellor has been made during the recess of the senate, the governor shall have no power to remove the person or appointee, nor power to withhold his name from the senate for their action."

[4] The Times-Picayune (New Orleans, Louisiana), Sep. 8, 1971, at 1, col. 3; The Commercial Appeal (Memphis, Tennessee), Sep. 8, 1971, at 1, col. 3; The Clarion-Ledger (Jackson, Mississippi), Sep. 8, 1971, at 8, col. 2.

[5] Garwood, *Breakfast Observations on Selection of Judges,* 44 J. AM. JUD. SOC'Y 134, 138 (1960).

Through the twelfth and into the thirteenth centuries the judges continued to be chosen from among the royal clerks, and gradually the rudiments of a legal profession emerged. By the end of the thirteenth and the beginning of the fourteenth centuries, the clerks were being replaced by men who had made their career at the bar. By 1316 the order of Serjeants at Law was formed from among the ranks of the leading practitioners of law. As the king ceased selecting judges from the royal clerks, he began selecting them from among the serjeants, and in the sixteenth century there emerged the custom that only a serjeant could be made a judge.[7]

Chancellors, like judges, traced their origins to ecclesiastical clerks, but, uniquely among the courts, chancery remained an executive office. It was not until late in the sixteenth century that the appointment of lawyers to chancellorships became common.[8]

Until the seventeenth century judges remained outside the religious and political issues embroiling England, but

> [A]s constitutional questions increased and were brought before the courts as legal issues, the judges gradually became involved in the political strife of the . . . century. The judges, lawyers and courts were caught up in the vortex of the conflict between King and Parliament. Most of the judges . . . became identified with the royal theories and power, and as adherents of the king some of them were subsequently punished when Parliament triumphed.[9]

The manipulations of the bench by the Stuarts, specifically their control over appointments and removals, led to the clause in the Act of Settlement of 1701[10] that judges' commissions were to be made *quamdiu se bene gesserint* [during good behavior]. Thereafter, an act of Anne[11] permitted judges and other crown officials to retain their offices for six months after the death of the king or queen, and an act of George III[12] provided that the death of the crown would not affect judicial tenure.[13] Significantly, George III

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[6] Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection,* 36 B. U. L. REV. 1, 15 (1956) [hereinafter cited as Vanderbilt].

[7] 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 194-95, 197 (7th ed. revised, reprinted 1966). After the middle of the sixteenth century it was customary that, prior to elevating any lawyer to the bench, an appointment to the ranks of the Serjeants at Law was required. This practice became so deeply rooted in English tradition that Parliamentary action was required for its abolition: The Judicature Act of 1873, 36, 37 Vict., c. 66, § 8; 1 HOLDSWORTH, *supra* at 197.

[8] Vanderbilt, *supra* note 6, at 16.

[9] *Id.*, at 16-17.

[10] 12 & 13 Will. 3, c. 2, § 3 (7) (1701).

> looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown.[14]

Later scholars looked upon the establishment of judicial tenure during good behavior and the concomitant independence of the judiciary as

> [t]he keystone of the rule of law in England. . . . It is the only respect in which we make any real separation of powers. There is no rigid separation between the legislative and the executive powers. . . . But the judicial power is truly separate. The judges for the last 250 years have been absolutely independent. . . . No member of Parliament, and no official of any Government Department, has any right whatever to direct or to influence or to interfere with the decisions of any of the judges.[15]

English judges are today appointed exclusively from the ranks of barristers of at least ten years experience, although it has been stated by a former Chief Justice of England, Lord Goddard, that ". . . nowadays 20 to 25 years standing is much more likely."[16] The highest ranking judicial officer in England is the Lord Chancellor, who is at once a Minister of the Crown responsible to Parliament, the head of the judiciary, and Speaker of the House of Lords. Although the Lord Chancellor is appointed by the Crown, custom dictates that the monarch merely confirm the recommendation of the Prime Minister. Notwithstanding the Act of Settlement of 1701,[17] the Lord Chancellor is a political officer and changes with governments,[18] but

> it is traditional that the Prime Minister will not select a man to hold the office of Lord Chancellor . . . unless he is a man who enjoys the confidence of the judges and of the legal pro-

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[11] 6 Anne, c. 7, § 8 (1706).

[12] 1 Geo. 3, c. 23 (1760).

[13] 1 HOLDSWORTH, *supra* note 7, at 195.

[14] Preamble, 1 Geo. 3, c. 23 (1760); Vanderbilt, *supra* note 6, at 18.

[15] Vanderbilt, *supra* note 6, at 18.

[16] Goddard, *Politics and the British Bench,* 43 J. AM. JUD. SOC'Y 124, 125 (1959).

[17] 12 & 13 Will. 3, c. 2, § 3 (7) (1701).

[18] Coldstream, *Judicial Appointments in England,* 43 J. AM. JUD. SOC'Y 41 (1959); Stason, *Judicial Selection Around the World,* 41 J. AM. JUD. SOC'Y 134, 136 (1958); Goddard, *supra* note 16, at 125-29.

> fession as a whole, . . . particularly the confidence of the judges and of the bar. . . . [A]ll Lord Chancellors . . . are . . . men who are thoroughly known and respected by the legal profession long before they reach the Woolsack.
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> It is this personal quality in the Lord Chancellor . . . that enables him to perform the difficult and anxious task of selecting the members of the judiciary. In the process of selection he acts, and is trusted to act, judicially, that is without fear or favour, affection or ill-will. . . .
>
> Nor will the Lord Chancellor lose the common touch in his elevation to the Woolsack. He will remain a bencher of his Inn, with no greater right than any other bencher and remaining in his place in the hierarchy of the bench. Thus he remains subject to the pressures of the professional and social criticisms of his intimates, with whom and against whom he has fought during his days at the bar.[19]

All other English judges are selected by the Lord Chancellor, but their tenure is during good behavior and, of course, they do not relinquish their offices with the changes of governments. The enormous patronage wielded by the Lord Chancellor has apparently suffered no abuse in modern times, but this is not to say that political considerations are not involved in the selection of judicial appointees. Chief Justice Goddard addressed this specific point as follows:

> It is easy and tempting to say that politics have nothing to do with it, but if by that is meant that no politician should be made a judge, or that a seat on the bench should never be a reward for political service, a little reflection will show that the problem is by no means as simple as that. It is highly desirable there should be lawyers in Parliament, and the law officers, the attorney-General always, and the Solicitor-General almost always, are members of the House of Commons where they have to take part in piloting intricate bills and to answer criticism on matters connected with the law and its administration. Prominent members of the bar have always gone into Parliament with the legitimate ambition of becoming law officers or obtaining puisne judgeships. If they are competent lawyers and show that they have judicial temperament, it would surely be quite as wrong to rule them out merely because they are in Parliament and support the government as it would be to appoint them merely because, while they were in Parliament, they could be relied on to vote with their party.[20]

The high esteem with which the English regard their judiciary and their judiciary's long record of integrity and competency can probably be attributed directly to Britain's success at preventing the development of the invidious politics so prevalent in America. The leadership of the English bar sits on the bench; the ultimate reward for an outstanding career at the bar is a judicial appointment. "And the public knows the process of judicial selection to be such that only by way of accident can a mediocre or otherwise undesirable judge obtain the office. . . . *It is not a process of popular election for a limited term, but rather a scrupulously studied selection by experts and for a term of service limited only by continued good behavior.*"[21] (emphasis added)

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[19] Coldstream, *supra* note 18, at 42.

[20] Goddard, *supra* note 16, at 129-30.

III

> *The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.*
> . . . .
>
> *He has obstructed the Administration of Justice, by refusing his Assent to Laws establishing Judiciary Powers.*
>
> *He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the amount and Payment of their Salaries.*[22]

Although the Act of Settlement of 1701[23] guaranteed the British judiciary tenure during good behavior, the Act was held not applicable to England's colonial possessions. In the famous trial of Peter Zenger in New York, one of the principal thrusts of the defense was directed at the legality of the judges' commissions on the grounds that they were during pleasure and not during good behavior.[24] In 1761 New York judges refused to serve unless their commissions were for good behavior rather than during the Crown's pleasure. The New York colonial legislature passed an act providing tenure during good behavior, prompting George III to threaten with removal from office any colonial governor who assented to any act regulating tenure; all commissions were to be during the king's pleasure only.[25]

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[21] Garwood, *supra* note 5, at 138.

[22] The Declaration of Independence; *see* E. Dumbauld, The Declaration of Independence and What It Means Today 158-59 (1950). The "present King of Great-Britain" who "obstructed the Administration of Justice" and "made Judges dependent on his Will" in the American colonies was the same George III who, in his domestic policies, "looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown."—Stark evidence that "credibility gaps" are nothing uniquely characteristic of twentieth century leaders only. See text, *supra*, at 4.

[23] 12 & 13 Will. 3, c. 2, § 7 (1701).

[24] J. Alexander, The Trial of John Peter Zenger, 397 (1 Annals of America, 1968).

From the outset the state constitutions provided for judiciaries appointed by either their chief executives or their legislatures and, with few exceptions, granted their judges tenure during good behavior.[26] The delegates to the federal constitutional convention in 1789 agreed early that the federal judiciary would also serve during good behavior,[27] but the question of judicial selection generated long debates. The Virginia Plan proposed a federal judiciary chosen by the federal legislature,[28] while the New Jersey Plan envisioned a federal judiciary appointed by the president.[29] A compromise of the plans resulted in Article II Section 2 of the Constitution of the United States of America:

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[25] "The British government claimed that the rule appropriate in England was not suitable to the situation of the Colonies. In the mother country the independence of the judges was assured not only by their tenure but by fixed salaries, which were not provided in the Colonies. Moreover, unless judges were removable at the king's pleasure, an unfit person, who might have obtained office because of the scarcity of properly qualified lawyers in the Colonies, could not be displaced even though a more fit person might afterwards be found." E. DUMBAULD, *supra* note 22, at 113.

[26] By 1800 the states of Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia provided for the selection of judges by either executive or legislative appointment. With only three exceptions these states provided judicial tenure during good behavior: Georgia, New Jersey, and Vermont provided tenure during a term of years. E. HAYNES, SELECTION AND TENURE OF JUDGES 101-35 (1944).

[27] *See* Vanderbilt, *supra* note 6, at 35. Alexander Hamilton deemed judicial tenure during good behavior crucial to the success of the United States.

> The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.
>
> . . . .
>
> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws. THE FEDERALIST No. 78, at 483, 89 (H. Lodge ed. 1888) (A. Hamilton).

> [The President] . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . the judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for. . . .[30]

IV

> *The authority . . . given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . .*
>
> . . . .
>
> [*A*] *legislative act contrary to the constitution is not law. . . .*
>
> —*Chief Justice John Marshall,*
> *Marbury v. Madison*[31]

The limits of Thomas Jefferson's and many another American's tolerance for the seemingly unbridled independence of the federal judiciary were reached when, in *Marbury v. Madison,* the Supreme Court announced its power to declare void, legislation passed by Congress and accepted by the President. "It is a misnomer to call a government republican in which a branch of the supreme power is independent of the nation,"[32] Jefferson wrote after the landmark decision. For the next twenty years Jefferson attempted first to establish a system of impeaching politically undesirable judges and second a constitutional amendment limiting them to six-year terms of office, and finally he toyed with the idea of popular election of judges.[33] In 1820 he wrote:

> The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the

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[28] M. Farrand, The Framing of the Constitution of the United States app. 2 (The Virginia Plan) at 225, 227 (1939).

[29] *Id.*, app. 3 (The New Jersey Plan) at 231.

[30] "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudices, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, at 474 (H. Lodge ed. 1888) (A Hamilton).

[31] 5 U.S. (1 Cranch) 137, 176-77 (1803).

[32] E. Haynes, *supra* note 26, at 93.

[33] *Id.* at 93, 94.

> foundations of our confederated fabric. . . . This will lay all things at their feet. . . . Having found from experience, that impeachment is an impractical thing, a mere scarecrow, they consider themselves secure for life. . . . An opinion is huddled up in conclave, perhaps by a majority of one, [and] delivered as if unanimous . . . by a crafty chief judge.[34]

Thomas Jefferson's attacks on the judiciary were only one of many factors that led to the erosion of judicial independence and respect in America during the early nineteenth century. The wave of democratic fervor sweeping Europe and America, the expansion into and development of the Mississippi and Ohio valleys and the resultant creation of frontier states, the influx of immigrants fresh from lands under the authority of an imperious aristocracy, the extension of the franchise to non-property owners, the abolition of property qualifications for holding public office, the suspicion with which Americans came to regard the English common law, the view that judges and lawyers were representatives of an oppressive creditor class, the growing class-consciousness of industrial laborers, and the pioneer idea that any man should be able to perform any task or fill any office without special training all contributed to the rising public belief that judicial independence and lack of responsibility to the people were both dangerous and undemocratic.[35]

Constitutional conventions were called, and radical changes in American judicial selection and tenure resulted. In keeping with the then-current political thought, many states vested in their legislatures the power to elect judges; other states granted the power of judicial selection to their chief executives, but they were themselves named by the legislatures in many states. Tenure during good behavior virtually disappeared from the state judicial bodies; the new constitutions provided tenure for a term of years. Only the federal judiciary successfully resisted the winds of democratic change.[36]

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[34] *Id.* at 94, 95.

[35] *Id.* at 80-101.

[36] *Id.* During the proceedings and debates of the Virginia constitutional convention of 1829-30, Chief Justice Marshall vigorously opposed that state's attempts to abolish judicial tenure during good behavior:

> The argument of the gentleman goes to prove not only that there is no such thing as Judicial Independence, but that there ought to be no such thing: that it is unwise and improvident to make the tenure of the Judge's office to continue during good behavior. . . . I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a Judge. He has to pass between the government and the man whom the court is prosecuting; between the most powerful individ-

V

> *There has been much division of opinion among thinkers upon the subject of whether the judges should be appointed by the governor with the advice and consent of the senate, or whether they should be elected by the people, and also whether they should hold for life or during good behavior as under the federal constitution, or whether they should have fixed terms for less than life or good behavior. . . . It seems desirable to remove the judges as far from politics as possible consistent with the right of the people to select their agents for the administration of government. . . .*[37]

The judicial provisions of Mississippi's first constitution, the Constitution of 1817, reflected both the general idea prevalent in eighteenth and early nineteenth century America that judges should serve during good behavior and the dissatisfaction which developed during the territorial period with old and incompetent judges. Article 5, Section 9 of the 1817 Constitution provided:

> The judges of the several courts of this state shall hold their offices during good behavior. And for wilful neglect of duty, or other reasonable cause, which shall not be sufficient ground for an impeachment, the governor shall remove any of them on the address of two-thirds of each house of the general assembly.

The 1817 instrument further provided that no person beyond the age of sixty-five years could be appointed or allowed to retain a judicial position.[38] There is evidence that many delegates to the constitutional convention preferred judicial appointments for a term of years, but a

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> ual in the community, and the poorest and most unpopular. . . . The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience. You do not allow a man to perform the duties of a juryman or a Judge, if he has one dollar of interest in the matter to be decided; and will you allow a Judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man? . . . I acknowledge that, in my judgment, the whole good which may grow out of this Convention . . . will never compensate for the evil of changing the tenure of Judicial office. Vanderbilt, *supra* note 6, at 24, n. 85.

"I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary." *Id.* at 24.

[37] G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 275 (1928).

[38] MISS. CONST. art. 5, § 10 (1817).

motion to change Article 5, Section 9 to read "for .... years" rather than "during good behavior" failed by a very close vote. There was also close voting on an unsuccessful motion to make the judges removable by a simple, rather than a two-thirds, majority of the general assembly.[39] Judicial appointments were to be made by a joint vote of both houses of the legislature,[40] but vacancies arising during a legislative recess were to be filled by executive commissions expiring at the end of the next legislative session.[41]

The desires of the Constitutional Convention of 1832 to draft a document more democratic than the Constitution of 1817 brought an end to judicial tenure during good behavior in Mississippi and ushered in the first popularly elected judiciary in America.[42] Unpopular judicial decisions, personal misbehavior, and official misconduct in the judicial ranks sparked unsuccessful efforts to remove justices of the peace and probate judges from office,[43] but perhaps the most important fomentors of dissatisfaction with the Mississippi judiciary, notwithstanding the impact of "Jacksonian democracy,"[44] were the unsuccessful efforts of three consecutive legislatures to impeach supreme court justice Joshua Child on grounds of dueling, drunkenness, and official misconduct and the controversial supreme court decision in *Cochrane v. Kitchens*[45] declaring unconstitutional an act of the Mississippi General Assembly. The supreme court judges were ordered before a committee of the state legislature to show cause why they should not be removed from office for their decision in the *Cochrane* case. Although the judges were eventually exonerated, the committee responsible for the investigation found no constitutional power authorizing judges to declare laws unconstitutional. "The 'outrageous official conduct' of Judge Child in particular, and the 'ascertained impossibility of getting rid of a judge misconducting himself ever so grossly, by *impeachment*,' were said to have 'contributed very materially' to the change in the constitution to provide for popular election of judges for a term, rather than appointment during good behavior."[46]

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[39] W. Drake, Constitutional Development in Mississippi, 1817-1865, 55, 84-85, 1954 (unpublished thesis in the University of North Carolina library).

[40] MISS. CONST. art. 4, § 17 (1817). "There is no evidence that the election of judges by the people was suggested in the convention. While the convention was in session a writer in one of the Natchez newspapers offered some advice to the convention on the judiciary article. He advocated the appointment of judges by the governor with the approval of the legislature. He also presented arguments against the periodical election of judges by the people, and said that popular election was being advocated by some citizens as being democratic and as a means of making the judges answerable for 'malfeasance or irregularities.'" Drake, *supra* note 39, at 83, n. 62.

[41] MISS. CONST. art. 4, § 13 (1817).

[42] *See* HAYNES, *supra* note 26, at 99-100; Hyde, *Judges: Their Selection and Tenure,* 30 J. AM. JUD. SOC'Y 152, 153 (1947).

[43] Drake, *supra* note 39, at 108-10.

[44] *See* Part IV, *supra.* Professor W. Magruder Drake observed of the rise of Jacksonian democracy and its purported influence on the development of Mississippi governmental institutions:

> It is easy to point to the constitution of 1832 and say that it was the result or manifestation in Mississippi of a nation-wide or even a world-wide movement known in later times as "Jacksonian democracy." But it is not easy to find much direct evidence of the fact that, between 1817 and 1830, the people of Mississippi were actually demanding or clamoring for changes in the conservative features of the constitution of 1817. If the constitution of 1832 is considered a result of the forces of Jacksonian democracy, therefore, it should be noted that the end result of any such popular movement is evidence that it did exist. Also, it is seldom possible to know exactly what the mass of the people of an earlier era were thinking or saying, and one can only assume that their representatives in the state legislature, in their actions and votes, reflected the will of the people. Drake, *supra* note 39, at 102.

The Constitutional Convention of 1832, well aware of the shortcomings of the state's judicial machinery, devoted more time to and achieved more changes in the judicial article of the 1832 Constitution than in any other part of that instrument. Whereas the 1817 Constitution provided for the popular election of only the governor, lieutenant governor, sheriffs, coroners, and legislators, with the legislature appointing all other officers, the 1832 Constitution's radical features provided "that not only the state and county executive officers, but also all judicial officers, from justices of the peace to judges of the high court of errors and appeals, should be elected by the people. The only public official in the state not elected by the people was the clerk of the high court."[47] Although there was opposition to the application of the elective process to the judiciary, after the first few years under the 1832 instrument there were no serious efforts to revive the appointive system.[48] Gone also was the standard of judicial tenure during good behavior. The 1832 Constitution provided:

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[45] Cochrane v. Kitchens (Supreme Court of Mississippi, June Term 1824). Unfortunately, *Cochrane v. Kitchens* is one of many opinions delivered orally from the bench and not reported because the first official reporter, R. J. Walker, of Natchez, was not in attendance. *See* Griffith, *Mississippi Reports and Reporters*, 22 Miss. L.J. 37-39 (1950). For a contemporary newspaper account of the case and subsequent investigation, *see* The Woodville Republican (Woodville, Mississippi), January 25, 1825, at 3, col. 2.

[46] Drake, *supra* note 39, at 108-10.

[47] *Id.*, at 321; *see* Miss. Const. art. 4, §§ 2, 5, 11, 16, 18, 20, 23 (1832).

[48] Drake, *supra* note 39, at 321. A letter to the editor of the Natchez Courier, March 22, 1833, signed "Fiat Justitia," predicted that the system of electing the judiciary would result in "intrigue, corruption, and partiality," and that "[p]ublic virtue

> No person shall ever be appointed or elected to any office in this state for life or during good behavior, but the tenure of all offices shall be for some limited period of time, if the person appointed or elected thereto shall so long behave well.[49]

Although the Constitution of 1869 retained the proscription of tenure during good behavior,[50] the post-Civil War instrument reverted to the system of appointing judicial officers. Unlike the 1817 Constitution, the 1869 document made specific provisions for executive appointment, by and with the advice and consent of the senate, of all judges of courts of record.[51] However, it is not to be presumed that the 1869 Constitution reflected wide-spread dissatisfaction with the provisions of the 1832 Constitution. Rather, one may safely presume that the majority of Mississippians—more particularly, the majority of disfranchised white Mississippians—were by far more content with the 1832 instrument than the 1869 "Mongrel" constitution. Indeed, an item appearing in a Jackson newspaper as a proposed "preamble" to the new constitution expressed the sentiments of many Mississippians:

> To the end that injustice be established, anarchy organized, tyranny inaugurated, and all manner of wickedness practiced under the forms of law, this covenant of death and league with hell is hereby ordained.[52]

Dissatisfaction with the appointive system established by the 1869 Constitution continued so long as the system existed. Twenty-two years passed until the Constitution of 1890 was adopted, thereby restoring a judiciary elected for a term of years.[53] The 1890 Constitution embodied

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will wither and droop and die. Vice will be triumphant." *See* Drake, *supra* note 39, at 175, n. 102.

[49] MISS. CONST. art. 1, § 30 (1832).

[50] MISS. CONST. art. 1, § 29 (1869).

[51] *Id.*, art. 6, §§ 2, 3, 11, 17.

[52] Daily Clarion (Jackson, Mississippi), June 6, 1868, at 2, col. 2.

[53] A Jackson editor offered this bit of advice to the delegates to the Constitutional Convention:

> The question of the mode of selecting judges is of grave concern and Democrats differ widely in opinion upon the subject. Mississippi pioneered the system of electing judges by the people. The plan of election was at one time universally approved by the people of our State. The difference of opinion now existing is due to changed conditions too well understood to require explanation. They can be readily reconciled by authorizing the Legislature to provide for popular elections in districts where people desire, and for appointment in districts where the present mode may be preferred. The same rule can be observed if deemed expedient, in the selection of the Judges of the Supreme Court. Daily Clarion-Ledger (Jackson, Mississippi), March 18, 1890, at 1, col. 2.

the principle that no public servant could serve during good behavior or for life but only for a specified term of years[54] and applied that principle to all judicial officers in the state.[55]

VI

> *For the election of judges by popular vote there is nothing to be said. Insofar as its underlying assumption is the belief that the people should choose those by whom they are to be governed it omits to note the vital fact that the qualifications for judicial office are not such as an undifferentiated public can properly assess. . . . Knowledge of the law, the balanced mind, the ability to brush aside unessentials and drive to the heart of a case—that a candidate will possess these qualities can, at best, be known only to a few. The people do not, in fact, choose their judges, they decide between the candidates of opposing parties. . . .*[56]

Efforts to improve state judicial bodies by freeing judges from partisan politics demonstrated little ingenuity and less accomplishment until the American Bar Association in 1937 adopted a resolution to establish methods of judicial selection " 'that will be conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the judges out of politics as nearly as may be.' "[57] The resolution set forth two procedures for accomplishing its stated goal:

> First—Appointment by the executive "but from a list named by another agency composed in part of high judicial officers and part of other citizens, selected for the purpose, who hold no other public office."
>
> Second—After a period of service, the appointee should "go before the people upon his record, with no opposing candidate, the people voting upon the question 'Shall Judge Blank be retained in office.' "[58]

In 1940 Missouri voters amended their constitution to provide for a judicial selection system based on the 1937 resolution of the American Bar Association and thereby became the first state to establish a merit selection plan for judges.[59] The "Missouri Plan" established two levels of selection commissions. The commission for the appellate courts, including the state supreme court and three intermediate appellate courts, is composed of seven members: the chief justice of the supreme court serves as chairman; three laymen are appointed by the governor; three lawyers are selected at large by the state bar. Except for the chief justice, members serve six-year terms staggered so that one term expires at the end of each calendar year. Members may not succeed themselves and, while serving on the commission, may hold no other public office or political position. Lay members are appointed every two years by the governor, each from a different court of appeals district; likewise, the lawyer-members are elected every two years by the members of the bar of their respective appellate districts.

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[54] "No person shall be elected or appointed to office in this state for life or during good behavior, but the term of all officers shall be for some specified period." MISS. CONST. § 20 (1890).

[55] MISS. CONST. §§ 145, 145A, 145B, 149 (Supreme Court), 153 (circuit and chancery courts), 170 (supervisors), 171 (justices of the peace); MISS. CODE ANN. § 1608 (Supp. 1971) (county courts).

[56] Laski, *The Technique of Judicial Appointment,* 24 MICH. L. REV. 529, 531 (1926).

[57] Hyde, *Judges: Their Selection and Tenure,* 30 J. AM. JUD. SOC'Y 152, 155 (1947).

[58] *Id.*

The selection commissions for city courts are composed of five members: the presiding judge of the appellate court of the district in which the city is located serves as chairman of the commission of two laymen, appointed by the governor, and two lawyers, elected by the local bar. As with the appellate commission, members' terms, except the presiding judges', are for six years, staggered so that each member's term expires in a different year. Since the governor of Missouri serves a four-year term and may not succeed himself, no governor can appoint all the members of the commissions.[60]

Whenever a vacancy occurs in any judicial office affected by the plan, three steps are taken to name a successor:

1. The proper nominating commission selects three persons who, so far as may be determined, possess the requirements of a judge, and their names are submitted to the governor.

2. The governor appoints one of the three nominees to fill the vacancy. In the event the governor fails to appoint within a specified

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[59] Mo. Const. art. 5, § 29 (a) *et seq.* Although the plan was met with some amount of skepticism when first proposed,

> To the surprise of everyone, the amendment was adopted at the 1940 election by more than 90,000 votes. Its opponents said that the people did not understand it and obtained its resubmission by the 1941 Legislature. It was then retained by more than 180,000 votes. This was considered a rather effective demonstration that the people likewise understood what some of the opponents of the plan wanted. Therefore, when a convention was assembled in 1943 to frame a new constitution for Missouri, this plan was reincorporated in it without change except to place more judges under it. Hyde, *supra* note 58, at 156.

[60] Hyde, *supra* note 58, at 156.

time, the nominating commission is empowered to appoint from the three names originally submitted to the governor.

3. If after twelve months service as judge the appointee indicates to the secretary of state that he desires to serve a full term (twelve years, appellate judges; six years, trial judges), his name is placed on a special judicial ballot with no party or political designation, as follows:

SHALL JUDGE____________________________________,
(Here the name of the Judge shall be inserted)

OF THE____________________________________COURT
(Here the title of the court shall be inserted)

BE RETAINED IN OFFICE?
YES ☐ NO ☐
(check one)

The names of judges desiring to serve full terms are submitted to the electorate at the next general election. Supreme and intermediate appellate court judges are elected by the voters of the three Missouri appellate court districts; trial court judges are elected by the voters of their respective judicial circuits. Judges who receive a favorable vote serve full terms; if the vote is against retention of a judge, or if a judge fails to declare his intention to go before the electorate, a vacancy exists and the appointing process begins anew.[61]

That the Missouri Plan has improved the caliber of the state judiciary by deleting political considerations from judicial selections, thereby attracting men to the bench who would otherwise remain at the bar, was revealed by a review of the achievements of the plan after its first twenty-five years of operation:

> As a whole, the lawyers appointed to the bench under the Plan have not been politicians, although many of them have taken part in city, county and state affairs; however, all of them have observed the constitutional mandate [prohibiting judges from engaging in politics] and have completely removed themselves from politics. Our judges now are free to devote their entire attention to court business. They have no political fences to mend, and are free to decide the issues in all cases under the applicable law and evidence without fear or favor, and independent of outside influence. The political bosses or other

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[61] Bundschu, *The Missouri Non-Partisan Court Plan—Selection and Tenure of Judges,* 16 U. Mo. K. C. L. Rev. 55 (1948). A selected annotated bibliography of materials dealing with judicial administration, including the Missouri Plan and other non-partisan, merit selection systems, appears at 45 J. Am. Jud. Soc'y 177-88 (1962).

> interests no longer attempt to control or influence the courts. We have been able to attract able, well qualified men to the bench, who would not have considered a judicial career under the old system. The Plan has been successful in eliminating personal and political appointments to the bench and partisan elections. *The over-all result has been abler and better qualified judges, whose sole duties are to administer equal justice to all without delay. Because of this the Missouri Plan has been a tremendous improvement in comparison with the old partisan political system.*[62] (Emphasis added.)

VII

> *The vital question is of course whether the masses, energized and activated by freedom, can create aught worthwhile on their own.*[63]

Perhaps there has been no greater achievement of western man than the evolution of the common law, those principles by and upon which he has sought to govern the daily affairs of life. Over a half-millenium of trial and error led British rulers to realize that political stability was greatly dependent upon the faith of the governed that their conduct would be measured in their courts by impartial, independent judges applying historically-forged standards, rather than by judicial tyrants rendering only fiat. The men to whom Britons entrusted the power and responsibility of selecting judicial officers were tradition-bound, aristocratic intelligentsia who selected, for the most part, tradition-bound, aristocratic intelligentsia to serve as judges. These judges established legal principles that are at once the most durable and the most flexible in the annals of history.

While American legal institutions are founded upon the same broad principles as their English counterparts, America has never achieved a system of filling judicial posts with the best qualified men. Unlike Great Britain, where judges are selected by an elite corps of jurists, whose choices are based on the sound advice of their contemporaries and their own discriminating observations, America has experienced a history of trusting the responsibility of selecting judges to chief executives or legislatures. After it became apparent that neither of these political organs was competent to make consistently sound selections, the responsibility has been shifted to the electorate. The historical trend is evident in Mississippi's groping for a suitable system. Political leaders have been unsuccessful at appointing good judges consistently, and the electorate has been unsuccessful at electing them. The next step should be in the direction of a system that makes judicial selections based upon the studied recommendations of panels of citizenry and bar members chosen for that specific task.

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[62] Hall, *The Missouri Nonpartisan Court Plan: A Quarter Century Review*, 33 U. Mo. K. C. L. Rev. 163, 168 (1965).

[63] E. Hoffer, The Ordeal of Change 39 (1964).

Arlen B. Coyle

STATUTORY AUTHORIZATION OF ADDITUR AND REMITTITUR

I. INTRODUCTION

The power of a court, on motion for a new trial due to inadequate damages rendered by jury verdict, to require the defendant to consent to an increase to a stipulated amount of the award as a condition for denial of the motion for a new trial is commonly referred to as additur.[1] This practice has also been described as increscitur.[2] Similar to additur is remittitur, a term which describes the power of a court upon a motion for a new trial due to excessive damages rendered by a jury to require the plaintiff to consent to a decrease in the award to a specified amount as a condition for denial of the motion.[3] Additur and remittitur are designed to bring inadequate or excessive damages awarded by a jury within the "amount of damages which the court judicially knows is within the limits of a proper verdict"[4] and thereby avoid the necessity of a new trial.[5]

This comment will examine the history of additur and remittitur in Mississippi and analyze the recently enacted statutory authorization[6] for the use of additur and remittitur in this state. This necessitates a general survey of the historical development and status of additur and remittitur in other jurisdictions.

II. DEVELOPMENT AND STATUS OF REMITTITUR

A. Development and Status in Other Jurisdictions

The practice of remittitur has long been established in American jurisprudence.[7] It was utilized in the federal courts by Mr. Justice Story, sitting on circuit, as early as 1822 in *Blunt v. Little*,[8] and its use has been held to give the defendant no cause for objection.[9] The scope of the use of remittitur in federal courts was set forth in *Hansen v. Boyd*[10] where it was stated:

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[1] Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition That Damages Be Increased,* 3 CALIF. W. L. REV. 1 (1967) [hereinafter cited as Bender].

[2] McCormick, DAMAGES § 19 at 82 (1935); Note, *Increscitur in Personal Injury Cases,* 15 ST. LOUIS L. REV. 169 (1930).

[3] Carlin, *Remittiturs and Additurs,* 49 W. VA. L. REV. 1 (1942).

[4] Dimick v. Schiedt, 293 U.S. 474, 497 (1935) (dissenting opinion).

[5] Bender, *supra* note 1.

[6] MISS. CODE ANN. § 1686.5 (Supp. 1971).

[7] *See* the collection of decisions in Annot., 53 A.L.R. 779, 783-92 (1928), 95 A.L.R. 1163, 1166-68 (1935); In England the practice of remittitur was at first approved in

> The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party, in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same.[11]

In 1935 the United States Supreme Court in *Dimick v. Schiedt*,[12] while holding additur unconstitutional, indicated that the practice of remittitur "would not be reconsidered or disturbed."[13]

B. *Development in Mississippi*

As in other jurisdictions, the practice of remittitur is firmly established in Mississippi,[14] and a plaintiff who voluntarily consents to a remittitur has no standing on appeal.[15] A conditional remittitur order may be entered in Mississippi when it is determined that a verdict of a jury is so excessive as to evince bias, passion, and prejudice on the part of the jury.[16] In addition, it has been said that even when prejudice, passion, and bias are absent, a remittitur may be entered if the excessiveness of the judgment is unsupported by the evidence.[17]

It appears that the only attempt to limit the scope of the practice of remittitur in Mississippi came early in this century. Section 4910 of

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Belt v. Lawes, 12 Q.B.D. 356 (1884), but was later repudiated, and *Belt* was overruled in Watt v. Watt, A.C. 115, 6 B.R.C. 1 (1905).

[8] 3 F. Cas. 760 (C.C.D. Mass. 1822).

[9] Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889).

[10] 161 U.S. 397 (1896).

[11] *Id.* at 411.

[12] 293 U.S. 474 (1935).

[13] *Id.* at 485.

[14] Houston v. Page, 208 So. 2d 901 (Miss. 1968); Dennis v. Berryman, 200 So. 2d 437 (Miss. 1967); Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967); Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Capital Transport Co. v. Segrest, 254 Miss. 168, 181 So. 2d 111 (1965); Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962); Thomas v. Fleming, 241 Miss. 26, 128 So. 2d 854 (1961); Motors Ins. Corp. v. Lenior, 218 Miss. 348, 67 So. 2d 381 (1953); Case v. Yazoo & M.V.R.R., 114 Miss. 21, 74 So. 773 (1917); Hurd v. Germany, 8 Miss. 675 (1843); Young v. Englehard, 2 Miss. 19 (1834).

[15] Alabama & V. Ry. v. Davis, 69 Miss. 444, 13 So. 693 (1891).

[16] Whitten v. Land, 188 So. 2d 246 (Miss. 1966).

[17] Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962).

the Mississippi Code of 1906 purported to abolish all authority of a trial court to enter a remittitur order.[18] In addition, it was provided that when the only error committed during the trial was the excessiveness of the verdict, the court was compelled to deny the defendant's motion for a new trial.[19] Furthermore, the supreme court was given the authority to either reverse the case or enter a conditional remittitur order if and when the case was appealed.[20] The constitutionality of this statute was challenged in 1907 in *Yazoo & M.V.R.R. v. Wallace*[21] wherein, after a $50,000 verdict was returned in favor of the plaintiff, the trial court denied the defendant's motion for a new trial on the basis that §4910 gave it "no power to interfere with the amount of the verdict."[22] Of §4910, the supreme court said:

> This statute is plainly unconstitutional and void. It is for the benefit of plaintiffs. It shuts out defendants from having complete and final disposition of their rights in a forum provided by the organic law for all, and into which they have been forced by plaintiffs. It compels them to appeal, which otherwise they might not wish to do, and then concludes with a clause, as a salve by attempting, in the very face of the Constitution, to give the Supreme Court original, instead of mere appellate, jurisdiction. It works only against the defendant litigant. If the verdict against him be for too much, he must bear the injustice; but note, if it be for too little, the favored plaintiff is not concluded, but may move for new trial.[23]

Thus, other than the ill-fated attempt of the legislature in 1906 to limit its practice, remittitur may be said to be a well-established, judicial practice in Mississippi.

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[18] Miss. Code of 1906 § 4910:

> The circuit court shall not in any case have the authority to cause the plaintiff to enter a remittitur on pain of suffering a new trial, but if there is no other error committed during the trial of any such cause except that the verdict is, in the opinion of the court, excessive, the court shall overrule the defendant's motion for a new trial. But the Supreme Court may, where it thinks the verdict of the jury excessive, reverse the case unless the appellee will enter a remittitur in such sum as the Supreme Court shall direct.

[19] *Id.*

[20] *Id.*

[21] 90 Miss. 609, 43 So. 469 (1907).

[22] *Id.* at 614, 43 So. at 470.

[23] *Id.* at 614-15, 43 So. at 470. Chief Justice Whitfield, specially concurring, was not so kind in his denunciation of the statute. He declared that "[o]n behalf of the code commissioners who prepared the Mississippi Code of 1906, I desire to say that section 4910 here involved, . . . [is] nonsense written therein by legislative blundering." *Id.* at 616, 43 So. at 471.

III. DEVELOPMENT AND STATUS OF ADDITUR

A. Other Jurisdictions

An early consideration of whether a court has the power to increase the judgment of a jury occurred in *McCoy v. Lemon,*[24] decided in 1856, in which such authority was denied. In *McCoy* a South Carolina court refused to recognize an old common law rule that a trial court may increase the damages awarded by a jury in mayhem actions *super visum vulneris.*[25] In the following years some state decisions allowed courts to increase a jury verdict when the amount that was to be the subject of the increase was ascertainable by mathematical calculation or by definite and fixed rules of law.[26] The practice of additur was extended to personal injury suits involving unliquidated damages in a New Jersey[27] decision of 1917 and a Washington decision of 1924.[28]

In 1935 *Dimick v. Schiedt*[29] presented to the United States Supreme Court the question of whether to allow the practice of additur in actions involving unliquidated damages in the federal courts. In a five-to-four decision,[30] the Court held that an additur entered without the consent of the plaintiff acted to deprive him of his right to a trial by jury under the seventh amendment to the United States Constitution.[31] To ascertain the scope and meaning of the seventh amendment, the Court turned to the common law rules as they existed at the time of the adoption of the seventh amendment in 1791 and concluded:

> [W]hile there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the

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[24] 45 S.C.L. (11 Rich.) 165, 70 Am. Dec. 246 (1856).

[25] Upon viewing the wound.

[26] James v. Morey, 44 Ill. 352 (1867); Carr v. Miner, 42 Ill. 179 (1866); Marsh v. Kendall, 65 Kan. 48, 68 P. 1070 (1902); McAfee v. Dix, 101 App. Div. 69, 91 N.Y. Supp. 464 (1905); Alloway v. City of Nashville, 13 S.W. 123 (Tenn. 1890).

[27] Gaffney v. Illingsworth, 90 N.J.L. 490, 101 A. 243 (1917).

[28] Clausing v. Kershaw, 129 Wash. 67, 224 P. 573 (1924).

[29] 293 U.S. 474 (1935).

[30] This decision has been the subject of severe criticism. *See, e.g.,* Carlin, *supra* note 3, at 18; 10 WASH. & LEE L. REV. 46 (1953); Note, 23 CALIF. L. REV. 537 (1935); 14 SO. CALIF. L. REV. 490 (1941).

[31] The seventh amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States, than according to the rules of the common law.

> amount of damages awarded by a jury in actions such as that here under consideration.[32]

The Court pointed out that the question of damages is a question of fact, and since the power to determine questions of fact lies within the province of the jury, a federal court's action of increasing an award of damages constitutes a re-examination of a fact tried by a jury[33] and violates the seventh amendment.

Although the remittitur practice might have been held unconstitutional upon the same argument as was applied with respect to additur, the Court attempted to rationalize a distinction between the two practices, stating:

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.[34]

Justice Story, dissenting,[35] recognized that the practice of additur is a method whereby litigation may be brought to a rapid, economical conclusion while procuring "substantial justice."[36] Of the distinction between additur and remittitur enunciated by the majority, Justice Story said:

> The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither does the jury return a verdict for the amount actually recovered, and in both the

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[32] 293 U.S. at 482.

[33] 293 U.S. at 486.

[34] 293 U.S. at 486. Of this distinction, Professor Millar in *Notabilia of American Civil Procedure 1887-1937,* 50 HARV. L. REV. 1017 (1937), said:

> There is no convincing reason why the *additur* (for so it has conveniently been called) should not be governed by the same considerations as the *remittitur.* The fact that in the one case the jury has reached and gone beyond the amount finally incorporated in the judgment, while in the other the jury has not reached that amount, represents a difference purely superficial, for in the case of *remittitur* no less than in that of *additur,* it is the jury's estimate which is the subject of the interference by consent of the party whom this interference adversely affects. *Id.* at 1053.

[35] Chief Justice Hughes, Justice Brandeis, and Justice Cardozo joined in the dissent.

[36] 293 U.S. at 490 (dissenting opinion).

> amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.[37]

In concluding that additur did not violate the seventh amendment, he noted that the basis upon which a plaintiff's motion for a new trial due to inadequate damages is denied is "that the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict."[38]

The holding in *Dimick* that the additur practice is unconstitutional applies only to federal courts, since the seventh amendment to the United States Constitution has not been incorporated into the due process clause of the fourteenth amendment.[39] Furthermore, most state constitutions, in providing for the right to trial by jury in civil cases, do not contain a re-examination clause such as that found in the Federal Constitution.[40] However, in 1952 the California Supreme Court accepted the reasoning of *Dimick* and held in *Dorsey v. Barba*[41] that the additur practice, when applied in cases involving unliquidated or disputed damages, violated the state constitution[42] in that it acted to deny a plaintiff of his right to determination by a jury of a factual issue (amount of damages).[43] The *Dorsey* decision, however, was reconsidered and expressly overruled in 1967 by *Jehl v. Southern Pacific Co.*[44] Chief Justice Traynor, writing for a unanimous court, stated that "when considered in the light of the demands of fair and efficient administration of justice . . . [the court did] . . . not believe that defendants should be denied the advantages of additur when they are required to submit to remittitur."[45] Rejecting the distinction between remittitur and additur raised in *Dimick* and *Dorsey,* Chief Justice Traynor stated:

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[37] 293 U.S. at 494 (dissenting opinion).

[38] 293 U.S. at 497 (dissenting opinion).

[39] Pearson v. Yewdall, 95 U.S. 294 (1877); Walker v. Sauvinet, 92 U.S. 90 (1875). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n. 2 (1964) (dictum). The Mississippi Supreme Court in *Canning v. State,* 226 So. 2d 747, 752 (1969), indicating the contrary stated:

> There seems to be no question now that the United States Supreme Court has firmly "absorbed" the first eight Amendments of the Constitution of the United States into the "due process" clause of the Fourteenth Amendment, and has thus made them applicable to the states.

Reference was made to *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *Benton v. Maryland,* 395 U.S. 784 (1969), for a list of cases sustaining this proposition. This blanket statement by the Mississippi Supreme Court is clearly erroneous. Neither *Duncan* nor *Benton* contain any authority for this proposition with regard to the seventh amendment. It is possible that the source of this statement was the view expressed by Justice Black in a concurring opinion in *Duncan* as to what he thought the effect of the due process clause to be. However, as yet, the United States Supreme Court has rendered no decision which would incorporate the seventh amendment right to trial by jury in civil suits into the fourteenth amendment's due process clause. In fact, the United States Supreme Court has consistently taken the position that the seventh amendment guaranty of a right to trial by jury in common-law suits is not applicable to the states. *See* Annotation and collection of cases in 18 L. Ed 2d 1388, 1410-12 (1967), supplemented in 23 L. Ed 2d 985 (1969).

[40] Most state constitutions provide that "the right to trial by jury shall remain inviolate." *See, e.g.,* CALIF. CONST. art. I, § 7; NEB. CONST. art. I, § 6; OHIO CONST. art. I, § 5; NEW JERSEY CONST. art. I, ¶ 9. Only the constitutions of West Virginia and Oregon contain re-examination clauses resembling that of the seventh amendment to the United States Constitution. W. VA. CONST. art. 3, § 13; ORE. CONST. art. I, § 17. Louisiana has no constitutional guarantee of a right to trial by jury in civil cases.

[41] 38 Cal. 2d 350, 240 P.2d 604 (1952).

> Remittitur happened to develop earlier than additur because courts undertook to grant new trials for excessive damages long before they took similar action on the ground of inadequacy. (citations omitted). The issue of additur was not presented until modern times, but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. Its acceptance, though still somewhat retarded, is growing. It should not be treated differently from other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters,[46] one that preserves the essentials of the right to jury trial without shackling modern procedure to outmoded precedents. Additur does not detract from the substance of the common law trial by jury. Like its fraternal twin remittitur . . . it promotes economy and efficiency in judicial proceedings.[47]

Since the seventh amendment, including its reexamination clause, is not applicable to the states, it was concluded that neither it nor the California Constitution forbade the use of additur or remittitur in the state courts of California.[48]

Prior to *Jehl* several states passed upon the question of whether to allow additur in cases involving unliquidated or disputed damages.

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[42] CALIF. CONST. art. I § 7: "The right of trial by jury shall be secured to all, and remain inviolate. . . ."

[43] 38 Cal. 2d at 358, 240 P.2d at 608.

[44] 59 Cal. Rptr. 276, 427 P.2d 988 (1967); noted at 8 SANTA CLARA LAW. 123 (1967).

[45] *Id.* at 280-81, 427 P.2d at 992-93.

[46] Noting that judgment notwithstanding the verdict is allowed in California in cases where it is proper to issue a directed verdict, while such procedure has been held to be inconsistent with the seventh amendment to the Federal Constitution. Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). This position has been undermined in federal courts by Fed. R. Civ. P. 50(b) and Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

[47] 59 Cal. Rptr. at 282-83, 427 P.2d at 994-95.

[48] 59 Cal. Rptr. at 285, 427 P.2d at 997.

Courts in New York,[49] Minnesota,[50] New Jersey,[51] North Carolina,[52] Utah,[53] and Wisconsin[54] have reached the conclusion that a conditional additur order does not deprive the plaintiff of his right to trial by jury. A Florida court, relying upon *Dimick* and *Dorsey* reached the opposite conclusion,[55] as have several other courts.[56]

In 1970 the Supreme Court of Missouri considered additur in *Stahlheber v. American Cyanamid Co.,*[57] wherein a plaintiff-husband appealed on the grounds of inadequate damages a $6,000 award for loss of services, assistance, society and consortium of his wife. He asked that any inadequacy in the jury's verdict be cured by an additur based upon a mathematical formula suggested by two prior cases[58] involving a husband's loss of his wife's services.[59] Recognizing that the doctrine of additur had never been applied in Missouri, the plaintiff raised the argument that additur is a logical corollary of remittitur, which was a firmly established practice in the trial and appellate courts of that state.[60] The court pointed out that this argument had previously been rejected in the early remittitur case of *Burdict v. Missouri Pacific Ry. Co.,*[61] in which it was said:

> An argument pressed upon our consideration in this case is this: That, if this court has the right and power to reduce the damages when excessive, it has the right and power to increase them when inadequate. We do not see the force of this line of argument. In one case the court simply says the judgment may stand for a part of the amount found by the jury, while in the other case it would add something never within the terms of the verdict.[62]

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[49] O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E. 2d 883 (1956).

[50] Genzel v. Halvorson, 248 Minn. 527, 80 N.W. 2d 854 (1957).

[51] Fisch v. Manger, 24 N.J. 66, 130 A.2d 815 (1957).

[52] Caudle v. Swanson, 248 N.C. 249, 103 S.E. 2d 357 (1958).

[53] Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826 (1958).

[54] Cordes v. Hoffman, 19 Wis. 2d 236, 120 N.W. 2d 137 (1963), changing the method of determining the amount of the additur first advanced in Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927), *Cf.* Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

[55] Sarvis v. Folsom, 114 So. 2d 490 (Fla. App. 1959).

[56] *See* Bender, *supra* note 1 at 20-24; Annot., 56 A.L.R. 2d 213.

[57] 451 S.W.2d 48 (Mo. 1970).

[58] Massey v. Berlo Vending Co., 329 S.W.2d 772 (Mo. 1959); Gooch v. Avsco, Inc., 340 S.W.2d 665 (Mo. 1960).

[59] Stahlheber v. American Cyanamid Co., 451 S.W.2d at 64, 65.

[60] *Id.* at 65.

[61] 27 S.W.2d 453 (Mo. 1894).

[62] *Id.* at 458.

Although recognizing that additur is applied in some jurisdictions, the Missouri court concluded that "[w]hatever might be the arguments in favor of the additur doctrine, we reject it in this case."[63] The case was reversed and remanded for a new trial on the issue of damages only.[64]

Additur was apparently rejected in *Stahlheber* because the inadequacy of the damages grew out of the failure of the jury to give any consideration to possible future damages for the plaintiff's loss of consortium of his wife.[65] The court was of the opinion that "[a]n attempt to measure the amount of such damage, either on the basis of the record alone or on the basis of a mathematical formula . . . would not provide a proper consideration of this necessarily factual issue."[66] It should be noted that the Missouri Supreme Court apparently did not totally reject additur, rather, it rejected the practice where the jury totally fails to consider an element of damages.[67]

The Supreme Court of Utah[68] has found the power of a court to enter a conditional additur or remittitur order "implicit within the authority of [that] court to grant a new trial on the . . . ground of 'excessive or inadequate damages.' "[69] The New Jersey Supreme Court in *Fisch v. Manger*[70] found that additur and remittitur "violate [no] constitutional interdictions and . . . serve the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial."[71] One writer has observed that the decisions holding the practice of additur constitutional are "the better reasoned opinions on the question."[72]

Prior to the enactment of section 1686.5 of the Mississippi Code, three states, Washington,[73] Rhode Island,[74] and Massachusetts[75] had statutes directly authorizing the additur practice. Additur had been approved by case law prior to the enactment of the Washington statute.[76]

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[63] 451 S.W. at 65.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Bodon v. Suhrmann, 8 Utah 2d 42, 327 P.2d 826 (1958).

[69] *Id.* at 828.

[70] 24 N.J. 66, 130 A.2d 815 (1957).

[71] *Id.* at 823.

[72] Bender, *supra* note 1, at 26.

[73] WASH. REV. CODE ANN. § 4.76.030 (1962).

[74] R.I. GEN. LAWS ANN. § 9-23-1 (1956).

[75] MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970), *amending* MASS. GEN. LAWS ANN. ch. 231, § 127 (1956).

[76] Clausing v. Kershaw, 129 Wash. 67, 224 P. 573 (1924).

The Rhode Island statute is interesting in that it requires the court to give the defendant an opportunity to consent to an additur before a new trial due to inadequate damages may be granted.[77] The granting of an additur under this statute has been held not to be an invasion of the province of the jury.[78] The Massachusetts statute originally provided that "[a] verdict shall not be set aside solely on the ground that damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."[79] However, this sentence was amended in 1967 and now reads "until the defendant has first been given an opportunity to accept an addition. . . ."[80] This amendment apparently produces the same result as the Rhode Island statute.

B. *Development of Additur in Mississippi*

Whether a trial court could add to or increase the verdict of a jury appears to have first been considered in Mississippi in 1852 in *Buck v. Little.*[81] In that case an action of assumpsit was filed against the drawer of an inland bill of exchange. Although the bill was not protested, it was shown that the bill was drawn without authority. The jury returned a verdict against the defendant in the amount of the principal and interest of the bill. The trial court then added five percent to the amount of the jury's verdict, basing this increase upon a statute[82] allowing five percent damages in actions on domestic or inland bills of exchange.[83] On appeal the High Court of Errors and Appeals ruled that neither the jury nor the trial court could have assessed the extra five percent damages since the statute in question applied only to bills protested for non-payment.[84] However, the court, noting that even if the statute had given the plaintiff a right to the extra damages, the trial court's addition to the jury's verdict was erroneous, held:

> [A]s the jury had found a verdict for a specific sum of money, it was not competent for the court to render a judgment for any

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[77] R.I. GEN. LAWS ANN. § 9-23-1 (1956). In addition, the court must also give the plaintiff an opportunity to consent to a remittitur before it may grant a new trial due to excessive damages.

[78] Albro v. Vallone, 90 R.I. 392, 158 A.2d 571 (1960).

[79] MASS. GEN. LAWS ANN. ch. 231, § 127 (1956), *as amended,* MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970).

[80] MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970), *amending* MASS. GEN. LAWS ANN. ch. 231, § 127 (1956).

[81] 24 Miss. 463 (1852).

[82] HUTCHINSON'S CODE art. 5, 642 (Act of May 11, 1837).

[83] 24 Miss. at 464.

[84] *Id.*

> greater amount. All that the court in such case was authorized to have done, was to have set the verdict aside and given the plaintiff a new trial. In adding to the amount of the verdict, the court was assuming the province of the jury.[85]

The apparent position that no increase in the verdict of a jury by a trial court could be tolerated began to weaken when in *Stone-Lowe Cotton Co. v. Weil Bros.*,[86] decided in 1922, it was held that a trial judge could properly assess the damages in the amount sued for on a contract when the jury found for the plaintiff in general terms and did not mention the amount of their verdict.[87] In 1929 the Mississippi Supreme Court held in *Collins v. Carter*[88] that in an action on an open account, if the jury returned a verdict for the plaintiff without mentioning interest, the trial court could properly increase the verdict by the amount of interest to which the plaintiff might be entitled, since such action would be only a matter of mathematical computation.[89] In at least two other instances,[90] both involving damages which were liquidated, undisputed, or capable of determination by mathematical computation, the supreme court either allowed an increase in the jury's verdict by a trial court to stand[91] or added a sum to the verdict itself.[92]

In 1963 a clear position concerning the constitutionality of an additur order in cases involving unliquidated or disputed damages was finally rendered by the Mississippi Supreme Court in *Woodmansee v. Garrett*.[93] Woodmansee, the plaintiff, obtained a $365.00 judgment for personal injuries suffered as a result of a collision between a motor bicycle riden by himself and a car driven by Garrett, the defendant. Woodmansee, after obtaining the judgment, filed a motion for a new trial on the issue of damages only. The trial judge entered a conditional order sustaining the motion for a new trial unless the defendant consented to a $1,000 increase in the $365 judgment within ten days. Defendant Garrett filed an acceptance to the conditional additur order within the proscribed time limit. However, plaintiff Woodmansee refused to accept the $1,000 increase in the judgment and appealed the order to the supreme court. Defendant Garrett did not file a cross appeal but asked the supreme court to affirm the judgment against him, including the $1,000 additur.

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[85] *Id.*

[86] 129 Miss. 60, 91 So. 859 (1922).

[87] *Id.* at 71, 91 So. at 861.

[88] 155 Miss. 600, 125 So. 89 (1929).

[89] *Id.* at 604, 125 So. at 90.

[90] Ruffin v. J. & M. Schwabacher, Ltd., 156 Miss. 326, 126 So. 14 (1930); Indianola v. Love, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956).

[91] Ruffin v. J. & M. Schwabacher, Ltd., 156 Miss. 326, 126 So. 14 (1930).

[92] Indianola v. Love, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956).

[93] 247 Miss. 148, 153 So. 2d 812 (1963).

Although recognizing the inadequacy of the $365 judgment, the supreme court reversed and remanded the case for a new trial on the issue of damages only,[94] holding that the acceptance by the defendant of the conditional additur order was not binding on the plaintiff.[95] Justice Rodgers, writing for the court, stated:

> [W]e have come to the conclusion that where the amount in question is undisputed or liquidated, or the damage is fixed by law, or where the amount due may be determined by mathematical calculation, including interest, the trial court, or this Court on appeal, may add to the verdict of the jury so as to show the true amount due.[96]

However, it was further stated that:

> [T]he trial court cannot add to the verdict of the jury an additional sum as damages in unliquidated claims, nor can the trial court bind the plaintiff in a damage suit by adding to the verdict of the jury an additional award so as to circumvent the necessity of a new trial where the jury has returned an inadequate award of damages, and where a motion is made for a new trial on that ground.[97]

In arriving at its decision not to allow additur where unliquidated or disputed claims are involved, the court apparently did not examine the historical and state versus federal constitutional questions involved. Rather, it based its decision upon the "general rule that a trial court does not have the power arbitrarily to increase the verdict of the jury without the *consent of the party prejudiced,* as this is violative of the constitutional guaranty of trial by jury."[98] However, "the party prejudiced" in the case of an additur refers to the defendant, not the plaintiff.

The Mississippi Constitution of 1890 provides: "The right to trial by jury shall remain inviolate. . . ."[100] It does not contain a re-examination clause as does the United States Constitution[101] and, as has been pointed out, the seventh amendment to the Federal Constitution is not binding upon the states.[102] Six years prior to the *Woodmansee* decision, the Minnesota Supreme Court in *Genzel v. Halvorson*[103] decided that additur is within the constitutional power of a court. In *Genzel,* decided under a statute[104] identical to article 3, §31 of the Mississippi Constitution, the court stated:

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[94] *Id.* at 157, 153 So. 2d at 816.

[95] *Id.* at 152, 153 So. 2d at 814.

[96] *Id.* at 156, 153 So. 2d at 816.

[97] *Id.* at 157, 153 So. 2d at 816.

[98] *Id.* at 156, 158 So. 2d at 816 (emphasis added).

[99] 5 AM. JUR. 2d *Appeal and Error* § 946 (1962).

[100] MISS. CONST. art. 3, § 31.

[101] U. S. CONST. amend. VII.

> [A] reasonable appraisal [of the Minnesota constitutional provision] . . . compels the conclusion that the practice of using additur is in the interest of the sound administration of justice . . . [and that a] . . . trial court [is] within its constitutional power in raising the amount of damages with the consent of the defendant. This practice avoids the necessity of a new trial with its accompanying expense and delay. It does not prejudice the plaintiff's interests any more than the use of remittitur prejudices those of defendant.[105]

Thus, regardless of the positions taken by other jurisdictions, the status of additur in Mississippi, in light of *Woodmansee,* prior to its statutory authorization by the legislature was that the practice was allowed in cases involving liquidated or undisputed damages or where the damages were capable of being determined by mathematical calculation or fixed rules of law. However, its use was forbidden when the damages in question were unliquidated or disputed.

IV. Statutory Authorization Of Additur And Remittitur In Mississippi

Mississippi Code §1686.5, effective March 23, 1971 provides:

> The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only.[106]

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[102] *See* note 39, *supra; see, e.g.,* Masonite Corp. v. Lochridge, 163 Miss. 364, 141 So. 758 (1932), which recognized that federal court decisions construing the seventh amendment are not binding on state courts dealing with similar provisions in their own constitutions.

[103] 80 N.W.2d 854 (Minn. 1957).

[104] Minn. Const. art. 1, § 4.

[105] 80 N.W.2d at 859.

[106] Miss. Code Ann. § 1686.5 (Supp. 1971).

Apparently the statute is absolute in its terms. The phrase "case in which money damages were awarded" should reasonably be interpreted to mean all damages, including disputed or unliquidated damages, and not only those damages which are undisputed, liquidated, ascertainable by fixed rules of law, or determinable by mathematical calculation. The basis upon which an additur or remittitur order may be entered is that the award is excessive or inadequate due to "bias, prejudice, passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." In this sense the status of remittitur in Mississippi is uneffected, since it has been held that a remittitur may properly be entered for these reasons.[107] Thus, the statute has only the effect of codifying existing case law concerning remittitur in Mississippi.[108]

A problem is encountered, however, in interpreting the language of the statute. The last sentence states that if the additur or remittitur order "be not accepted then the court may direct a new trial on damages only." The question arises—accepted by whom? In the case of additur, must the plaintiff, the defendant, or both accept the increase in the verdict? If the term "additur" is defined in its conventional sense, the answer would be the defendant.[109] However, considering *Woodmansee*, this sentence could be interpreted to mean both the plaintiff and the defendant.[110] In addition, if this provision means both the defendant and plaintiff must accept an additur order, it seems a logical conclusion that the same would now apply to remittitur.

V. CONCLUSION

In light of the *Woodmansee* decision, the constitutionality of § 1686.5 of the Mississippi Code will probably have to face a test before the Supreme Court of Mississippi. If and when it does, a crucial question will be a determination of whether the additur practice denies a plaintiff his right to determination of a factual issue (amount of damages) by a jury. In this respect, it has been said:

> It is true that the practical effect of additur is to give the plaintiff an award based upon a finding made ultimately by the trial court. Courts often determine fact issues, however, and the acceptance of this practice over many years refutes the

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[107] Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962).

[108] Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962).

[109] Bender, *supra* note 1.

[110] *See* Woodmansee v. Garrett, 153 So. 2d at 816.

> argument that the framers of the Constitution regarded the jury as the only competent find of facts.[111]

In conclusion, it is submitted that a plaintiff is not deprived of his right to have a jury determine the amount of damages, a factual issue, since:

(a) He receives more, not less, than that which was awarded him by the jury in its verdict.

(b) He receives the full amount of damages that a reasonable jury might award.

(c) If he is dissatisfied with the amount of the award after the additur has been entered, he can still appeal on the ground that the award is inadequate.[112]

S. T. Rayburn

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[111] Jehl v. Southern Pacific Co., 427 P.2d at 994.

[112] *See* Markota v. East Ohio Gas Co., 97 N.E.2d 13, 19 (Ohio 1951).

STUDENT NOTES

EVIDENCE — OUT OF COURT STATEMENT AS NON-HEARSAY

The recent case of *Chambers v. State*[1] clearly demonstrates the confusion that can result from the use of a "shotgun approach"[2] to the hearsay rule. The Supreme Court of Mississippi used this approach with its corresponding emphasis on the character of the testimony to hold that oral out-of-court third party confessions were hearsay even when the third party declarant was himself present in court and had testified to a subsequent written confession and his repudiation of it.

It is obvious that in the fact situation that existed at the time the testimony was sought, it was not hearsay testimony and should not have been excluded for that reason. Such a holding evidences both a failure to correctly analyze the situation and a lack of understanding of the hearsay rule and its function.

This note will show that while the testimony was erroneously excluded as hearsay due to the factual situation, the testimony was inadmissible on other grounds. And lastly, the note will examine the purpose and function of the hearsay rule as it relates to this type of testimony when the testimony is sought as substantive evidence.

I. The Facts

Aaron Liberty, a part-time policeman, was killed when he was struck by four bullets fired from a dark alley. Leon Chambers was indicted for his murder, and a trial date was set. However, before Chambers went to trial Gable McDonald, an illiterate black, went to the office of Chambers' attorneys and, in answer to their questions, confessed that he had killed Liberty. His statement was then typed and read to him, and it was "signed by mark and sworn by McDonald."[3]

McDonald was arrested and brought before a justice of the peace for his preliminary hearing. At this time he completely repudiated his confession and stated that a Reverend Stokes had induced him to make it by promising that the confession was only for the purpose of bringing a civil suit against the town and that it would not be used against him criminally. He further testified that Stokes had told him that one-third of the proceeds of the suit would be given to him.

During the course of Chambers' trial the eyewitness testimony was contradictory. Some of it identified Chambers as the assailant, while other witnesses testified that McDonald had done the shooting.

The defense called McDonald as a witness, and he was allowed to testify as to his confession, the circumstances surrounding it, and his repudiation of it. He further denied that he had killed Liberty or that he had had any part in Liberty's death. The defense was not allowed to cross-examine McDonald as an adverse witness.

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[1] 252 So. 2d 217 (Miss. 1971).

[2] The term "shotgun approach" refers to the practice of classifying all out-of-court statements as hearsay merely because of their out-of-court character and with no consideration given to the purpose for which such statements were sought.

[3] Chambers v. State, 252 So. 2d 217, 218 (Miss. 1971).

After McDonald's testimony the defense sought to introduce two witnesses, Berkley Turner and Albert Carter. Turner testified in the absence of the jury that McDonald had confessed to him the night of the shooting. The trial judge ruled that this testimony was hearsay and would not allow Turner to testify before the jury. Thomas Russ testified, also in the absence of the jury, that McDonald had come to his house and confessed to him the day after the murder. The trial judge again refused, on the same basis of hearsay testimony, to allow the witness to testify before the jury.

The supreme court, affirming Chambers' conviction, held that the offered testimony was inadmissible as hearsay, citing 22A C.J.S. *Criminal Law,* Section 749[4] as the controlling authority.

Two alternative theories serve as the basis for holding that this exclusion of the testimony as hearsay was erroneous:

1. The testimony was sought not for the purpose of proving the truth of the matter stated therein, but for the purpose of impeachment by showing prior contradictory statements and is admissible as an independent relevant fact.

2. Alternatively, even if the testimony was sought for hearsay purposes, the policy factors upon which the hearsay exclusion rest are not applicable in this type of situation.

II. The Hearsay Rule[5]

The hearsay rule is, on its face, very simple. It says that "hearsay evidence must be excluded from the jury."[6]

McCormick defines heresay evidence as

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[4] 22A C.J.S. *Criminal Law* § 749 at 1115 (1961) states:

The extrajudicial declarations of a person other than accused, confessing or tending to show that he committed the crime, are generally held not to be competent for accused, for, although the latter may exculpate himself by proving, if he can, that someone with whom he was not connected committed the crime with which he is charged, he cannot do so by hearsay.

However, 22A C.J.S. *Criminal Law* § 752 at 1117-1118 (1961) states:

> A statement, however, of a witness, made outside the presence of the accused, including a statement made to the prosecuting attorney, or a confession of the crime by a witness, is admissible solely to impeach the witness; and when such statements contradict his testimony they may be proved, not as independent evidence or substantive proof of the fact stated, but only . . . as affecting the credibility of the witness.

[5] For a good discussion of the background and development of the hearsay rule *see* 5 J. WIGMORE, EVIDENCE § 1364 (3d ed. 1940) [hereinafter cited as WIGMORE].

[6] Wells v. Shipp, 1 Miss. (Walker) 353, 354 (1829).

> [T]estimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[7]

While this definition is by no means exhaustive, it does contain the essence of the hearsay test. It is readily discernible that the test for hearsay is a tripartite one. In order for specific testimony to be excluded as hearsay, it must (1) be based on a third party's out-of-court statement, (2) be sought as proof of the truth of the out-of-court statement, and (3) depend upon the out-of-court third party for its credibility.

If any one of these requirements of character, purpose, and credibility is lacking, then the testimony is not hearsay and should not be excluded on that basis. Recognizing this, it becomes obvious that in order to apply the hearsay rule, the offered testimony must be examined within the context of the trial court situation and with a careful eye toward all of the issues involved therein. The necessity of this "contextual analysis" can hardly be overemphasized.[8] It is only through the use of this medium that the hearsay purpose test can be answered.

The importance of the hearsay purpose test is that it recognizes the inappropriateness of the hearsay rule in certain situations. Such an inappropriate situation is the one in which the testimony is introduced for the purpose of proving that the out-of-court statement was in fact made, regardless of the truth or falsity of the words spoken.[9]

In order to fully comprehend the nature of this distinction it must first be recognized that the exclusion of testimony because it is hearsay reflects only on the *competence* and *credibility* of the testimony[10] "and involves no assertion that hearsay statements are without probative force or that they can furnish no logical basis for conclusion of fact, assuming, of course, they are logically relevant to some issue."[11]

Since "[t]he basis of exclusion [of hearsay testimony] is that the value of such a statement depends upon the competency and credibility of the out-of-court declarant rather than upon the competency and credibility of the witness"[12], whenever the testimony is relevant[13] for some purpose which does *not* involve the credibility or competence of the out-of-court declarant (i.e., the truth or falsity of the statement), then the hearsay rule is inapplicable. Neither the purpose nor the credibility part of the hearsay test is met.

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[7] C. McCormick, Law of Evidence § 225 at 460 (1954) [hereinafter cited as McCormick].

[8] It is a failure to "contextually analyze" that typifies the "shotgun approach."

[9] Such as in the case of slander, deceit, the making of a promise, or the speaking of marriage vows. For a good discussion of this general area *see* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. Pa. L. Rev. 484, 488 (1937); McCormick § 228.

[10] The competency and credibility of the testimony is involved because "if the statement of X [an out-of-court declarant] is offered as tending to prove the truth of what X stated, then no matter how accurate and truthful the witness, his testimony is still subject to all the dangers of possible defects in the perception, memory, narration and veracity of X." Morgan, *The Hearsay Rule,* 12 Wash. L. Rev. 1, 5-6 (1937).

[11] Citizens Bank v. Miller, 194 Miss. 557, 566, 11 So. 2d 457, 459 (1943).

The Mississippi Supreme Court recognized this basic distinction when it held:

> Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible as an independently relevant fact.[14]

If the fact that Liberty had made two previous confessions, regardless of the truth or falsity of the confessions themselves, was relevant to a fact in issue and was sought for that purpose, then obviously the testimony of Turner and Carter as direct eyewitness testimony to the fact that the statements were made was not heresay and should not have been excluded for that reason.

In order to determine whether the offered testimony in the instant case was sought for some relevant purpose other than heresay, it is necessary to examine the testimony within the context of the trial. In the instant case the main issue was, "Did Chambers kill Liberty?"

Eyewitness testimony indicated that either Chambers or McDonald did the killing; McDonald testified in court that he did not kill Liberty.

In this fact situation, McDonald's testimony is very crucial. If the jury believes that McDonald is telling the truth, they will probably find Chambers guilty. Therefore the *credibility* of McDonald is a decision issue in the trial. However, even if his testimony were not so important, the very fact that he took the stand and testified placed his credibility into issue.[15] Is the fact that McDonald previously confessed to two different people on two different occasions relevant to the issue of McDonald's credibility—regardless of the truth or falsity of the confessions? It is obvious that the fact that McDonald made the statements is of the highest probative worth and that Turner and Carter were competent witnesses to testify on that issue. The Mississippi courts,[16] as well as the courts in most other jurisdictions,[17] recognize the value of prior inconsistent statements as a method of impeaching a witness's credibility. And in this case there are strong grounds for suspecting the credibility of McDonald because the inconsistent statements were made after the motive to falsify arose, while the three consistent statements were made while there was no motive to lie.[18]

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[12] Goodman, *Hearsay Evidence,* in EVIDENCE 66 (M.L.I. 1968); *see also* MCCORMICK § 225, at 459; Morgan, *Some Suggestions for Defining and Classifying Hearsay,* 86 U. PA. L. REV. 258 (1938).

[13] "Evidence is relevant testimony if it tends to prove a material fact in issue . . . ." T. MCELROY, MISSISSIPPI EVIDENCE 116 (1955).

[14] Handshoe v. Daly, 211 Miss. 189, 193, 51 So. 2d 230, 232 (1951).

[15] Kolb v. State, 129 Miss. 834, 851, 93 So. 358, 361 (1922); *See also,* 98 C.J.S. *Witnesses* § 460 (1957).

[16] Darby v. State, 121 Miss. 869, 876, 84 So. 6, 7 (1920).

[17] MCCORMICK § 34; 3 WIGMORE §§ 1017-1046.

The relevancy of the testimony for this nonhearsay purpose makes it clear that this testimony is direct eyewitness testimony as to the statements being made and is not dependent upon the credibility or compentency of the declarant for its value. It therefore cannot be hearsay.

III. Proper Exclusion

While this discussion has shown that the sought testimony was improperly excluded under the hearsay rule, the proper objection should be apparent from the results of the purpose test. The purpose of introducing the testimony of Carter and Turner was to impeach the credibility of McDonald by showing the prior inconsistent statements. Although Mississippi recognizes the use of prior inconsistent statements to impeach the credibility of a witness's testimony on the stand, this use is limited in two major ways. First, a witness cannot be impeached by use of prior statements unless a foundation or predicate be laid.[19] If the witness has not had a chance to admit and explain the inconsistencies in his statement, then he cannot be impeached by showing prior inconsistent statements.[20] Secondly, one cannot impeach his own witness unless the witness is adverse or the calling party can plead surprise.[21]

In the instant case the defense sought to have McDonald classified as an adverse witness in order to be able to lay the predicate for his impeachment, but the trial court refused. The supreme court sustained this refusal on the basis that "McDonald's testimony was not adverse to appellant Chambers; it was merely in McDonald's defense and in explanation of his unusual confession. Nowhere did he point the finger at Chambers."[22]

It was this ruling, rather than the hearsay rule, that should have been used as the basis for the exclusion of the testimony of Turner and Carter.[23] The objection should have been either that the defense had not laid a predicate for the impeachment of the witness or that the defense was attempting to impeach his own witness.

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[18] For a good discussion of the admission of statements which antedate a motive to lie, *see* Judge Hand's opinion in Di Carlo v. U.S., 6 F.2d 364 (2nd Cir. 1925).

[19] Bonelli v. Bowen, 70 Miss. 142, 149, 11 So. 791 (1892).

[20] McCormick, *supra* note 7, § 37.

[21] Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964). For a comprehensive discussion of the basis for this rule *see* 3 Wigmore §§ 896-899.

[22] 252 So. 2d at 220.

[23] It will also be hard to prove surprise in the light of McDonald's previous repudiation of his guilt.

While it is apparent in the situation existing in this case that these rules result in the exclusion of very relevant and competent testimony, discussion of the rules themselves is beyond the scope of this note. However, it should be noted that this prohibition against impeaching one's own witness is a dying doctrine and has been recognized as such by many legal scholars.[24] In fact, both the Uniform Rules of Evidence[25] and the proposed Federal Rules of Evidence[26] have abandoned it and allow the calling party to impeach his own witness.

IV. The Spirit of the Hearsay Rule

An alternative theory is also available to demonstrate the inappropriateness of the hearsay rule in this type of situation. This is an "outside-of-the-spirit of the hearsay rule" approach.

If the situation that existed in the trial court is viewed in the light of the *purpose* and *function* of the hearsay rule, it is obvious that even if the sought testimony is hearsay within the "letter of the law," it is not hearsay within the "spirit of the law."

The exclusion of hearsay evidence is based on a feeling that such evidence is basically untrustworthy and therefore should not be allowed before the finder of facts.[27] The primary basis for this concern is described by Strahorn in the following passage:

> One of the psychological assumptions implicit in the law of evidence is that all human testimony in its natural state is too untrustworthy to be considered by a jury unless its narration be conditioned in a manner calculated so to improve it in trustworthiness as to avoid the danger of the jury's being deceived into an erroneous verdict.[28]

This belief in the "natural untrustworthiness" of human testimony led to the establishment of safeguards or "conditioning devices," which were designed to "encourage" the witness to be truthful in his testimony. Examples of these conditioning devices, the oath, the penalty for perjury, public testimonial narration in the presence of the fact finder, and cross-examination are familiar products of this concern.[29]

The hearsay rule is another product of this concern.[30] The purpose of the hearsay rule is to exclude from the jury testimony which has a doubtful quality of truth because it "is not subject to the tests which ordinarily can be applied for the ascertainment of the truth of testimony."[31] The fact that hearsay testimony is, in reality, a disguised form of "testimony in its natural state,"[32] as well as the lack of the oath (and accompanying penalty for perjury) [33] and the lack of the opportunity for cross-examination[34] have all been raised as objections to its use as evidence.[35]

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[24] *See* Ladd, *Impeachment of One's Own Witness—New Developments,* 4 U. Chi. L. Rev. 69 (1936); McCormick, *supra* note 7, § 38.

[25] Uniform Rules of Evidence, rule 20 cited in McCormick, *supra* note 7, at 111, n. 2.

[26] Proposed Federal Rules of Evidence 607 (Rev. Draft March 1971).

[27] J. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. Pa. L. Rev. 484, 486 (1937).

[28] *Id.* at 484.

[29] *Id.*

[30] *Id.* at 486.

Today, however, most authorities agree that the major defect in hearsay testimony is the lack of opportunity to cross-examine the absent declarant,[36] thus denying the adversary the opportunity to expose any defects in the declarant's perception, memory, narration, and veracity.[37] In the absence of any evidence on these factors, the finder of fact is unable to determine the credibility of the declarant.[38]

The specific concern that the Mississippi courts have with out-of-court third party confessions and the hearsay rule is demonstrated in *Brown v. State.*[39] In that case the defendant Brown tried to introduce testimony to show that his brother had confessed to committing the crime with which Brown was charged. The brother could not be found at the time of the trial, so Brown sought to prove his confession by the testimony of the sheriff to whom his brother had confessed. In upholding the trial court's exclusion of the testimony as hearsay, the court quoted from *Lyon v. State:*

> All one defendant would have to do would be to admit that his quilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and, after his acquittal, appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person.[40]

Of course, the logic behind this holding is unassailable. However, this logic does not have the same force when it is applied to the situation, as in *Chambers,* in which the declarant is himself in court and capable of testifying. In fact, when the situation in *Chambers* is viewed in the light of the *purpose* of the hearsay rule—to exclude untrustworthy testimony from the jury—the application of the hearsay rule is clearly inappropriate. The declarant is now in court and available for testimony under oath before the jury and available for cross-examination; he is subject to all of the devices designed to give his testimony more trustworthiness. Therefore none of the risks normally associated with hearsay testimony are present.[40]

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[31] Pevey v. Alexander Pool Co., 244 Miss. 25, 31, 139 So. 2d 847, 850 (1962).

[32] And therefore subject to the taint of "natural untrustworthiness." Strahorn, *supra* note 27, at 486.

[33] Pevey v. Alexander Pool Co., 244 Miss. 25, 139 So. 2d 847 (1962).

[34] Morgan, *supra* note 10, at 3-4; McCormick § 224.

[35] For a more indepth analysis of these factors *see* 5 Wigmore § 1362; McCormick § 224; T. McElroy, Mississippi Evidence § 18 (1955).

[36] Goodman, *supra* note 12, at 66; McCormick § 224; 5 Wigmore § 1362.

[37] Morgan, *supra* note 10, at 3-4.

[38] Goodman, *supra* note 12; Morgan, *supra* note 10.

[39] 99 Miss. 719, 55 So. 961 (1911).

[40] 22 Ga. 399, 401 (1857).

A more important result of such a misapplication of the rule is that the defendant is denied the full effect of the "beyond a reasonable doubt" standard for conviction. The fact that McDonald allegedly had freely confessed his guilt on two different occasions would be very substantial evidence in the minds of the jury as to whether McDonald was the killer or not. If there is a reasonable doubt as to McDonald's innocence, then it must follow that there is most definitely a reasonable doubt as to Chambers' guilt.

While admission of this type of highly relevant testimony could possibly encourage some minimal type of "witness fixing" in certain cases, all of the testimony would be given under oath before the jury and with ample opportunity for cross-examination. Does this not make the testimony at least as trustworthy as a dying declaration or a declaration against interest? In fact, had McDonald been unavailable, the declaration would have been admissible under the PROPOSED FEDERAL RULES OF EVIDENCE as a declaration against penal interest.[42] Is it logical to say, then, that because he is available his declaration is no longer trustworthy? Since McDonald was available to either explain or deny the testimony of Carter and Turner, their testimony as well as his should be more trustworthy. Therefore the testimony should have been recognized as an exception to the hearsay rule and admitted on that basis.

Conclusion

It is always discouraging to see a court of last resort completely misapply the law in any situation, but it is even more appalling in this situation, because this misinterpretation resulted in the expansion of a doctrine that is being seriously questioned on many different fronts.[43] In the legal world today the hearsay rule is gradually being "exceptioned to death." Its death is a slow but sure one. Faced with the competing policy factor of "hearsay evidence is better than no evidence,"[44] the hearsay exclusion is losing ground, and most writers agree that it has lost much of its bite.[45] Whether it will be completely abolished or whether it will merely be severely restricted is open to debate. It is a certainty that misapplication of the hearsay rule can result in a grievous injustice.

Edwin Spivey Gault

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[41] Morgan says that "there is one situation where the courts are prone to call hearsay what does not in fact involve in any substantial degree any of the hearsay risks. When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 192 (1948).

[42] PROPOSED FEDERAL RULES OF EVIDENCE 804 (b) (2) (Rev. Draft March 1971).

[43] For a good summation of the different approaches *see* PROPOSED FEDERAL RULES OF EVIDENCE art. VIII Introductory Note (Rev. Draft March 1971).

[44] *Id.*

[45] Goodman, *supra* note 12, at 69.

A QUESTION OF VENUE

Questions of subject matter jurisdiction, personal jurisdiction, territorial jurisdiction, venue, and venue jurisdiction have often created confusion in Mississippi. Legislative action and judicial decision, while answering many questions, have frequently created new problems. This paper is limited to an examination of the Mississippi venue statutes, their application to resident individual citizens of this state before *Wofford v. Cities Service Oil Co.,*[1] and the possible influence that decision will have on future cases.

Venue denotes the place or the "county or district, wherein a cause is to be tried."[2] Until the *Wofford* decision, proper venue in Mississippi for an action brought against a resident individual was in the county in which that defendant or any other defendant of record could be found.[3]

The general venue statute applicable to resident individual citizens of this State is section 1433 of the Mississippi Code, which provides in part:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found. . . . If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, . . . the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence. . . .[4]

This statute and prior statutes similar in wording have been construed by our court to mean that a default judgment taken against a resident defendant is void or voidable if no party defendant was served with process in the county of suit.[5]

When more than one resident defendant was sued, and venue was proper to one of them, it was proper to all.[6] When no resident defendant was served with process in the county of suit, the court did not have "jurisdiction" and ordinarily could not render a valid judgment.[7] However, even if a resident defendant was not served in the county of suit, a cause could be brought to trial if the defendant entered an appearance and specifically waived the improper venue,[8] if he consented to suit in the wrong county,[9] or if he entered a counterclaim.[10]

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[1] 236 So. 2d 743 (Miss. 1970).

[2] 56 AM. JUR. *Venue* § 2 (1956).

[3] MISS. CODE ANN. § 1433 (1956).

[4] *Id.*

[5] *See* Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730 (1957); Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930); Cook v. Pitts, 114 Miss. 39, 74 So. 777 (1917); Campbell v. Triplett, 74 Miss. 365, 20 So. 844 (1896); Pate v. Taylor, 66 Miss. 97, 5 So. 515 (1888); Wolley v. Bowie, 41 Miss. 553 (1867); Bank of Vicksburgh v. Jennings, 6 Miss. (5 How.) 425 (1841).

[6] Daniel & Sams, *Jurisdiction and Venue,* in CIRCUIT COURT PRACTICE 1, 39 (M.L.I. 1966).

[7] *Id.*

Before *Wofford* a resident individual citizen of Mississippi who was sued alone and out of the county of his residence had four choices: (1) Enter an appearance and move for a change of venue to the county of his residence; (2) appear and submit to the jurisdiction of the court; (3) fail to appear, allowing a default judgment to be taken against him, and set it aside by direct appeal; (4) allow a default judgment to be taken against him and set it aside by collateral attack.[11]

It is submitted that the rule making default judgments void or voidable in cases of improper venue[12] evolved out of concepts of "territorial jurisdiction." Territorial jurisdiction is the concept which limits a court's power to hear cases to those properly brought within the area it serves. The concept springs from two common law theories: (1) The common law required initially that an action be maintained in the county where the wrong occurred so that jury members could base their decisions on personal knowledge of the facts,[13] and (2) "with few exceptions, a court could only exercise its authority by judgment with respect to persons or property physically located within the territory served by the court."[14]

It appears that the process of a Mississippi court was effective in vesting that court with territorial jurisdiction only when a resident defendant was served with process in the county of suit by one of the three prescribed methods under section 1859.[15] Failure of service on a resident defendant in the county of suit rendered process to other counties ineffective. Absent service on a resident defendant in the county of suit, the process of the court was limited to the borders of the county it served.[16] The defendant, of course, could appear and submit to the jurisdiction of the court, thus vesting it with territorial jurisdiction, or he could appear and obtain removal to his home county. However, all too often the procedure was to allow the default judgment to be taken and then set it aside by direct appeal or collateral attack.[17]

Territorial jurisdiction has been described as follows:

> [I]f no proper party defendant is found and served within the county by one of the methods authorized by law, service of process upon a non-local defendant, regardless of his classifi-

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[8] *See, e.g.*, Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1919).

[9] *Cf.* Crosby v. Robertson, 243 Miss. 420, 137 So. 2d 916 (1962).

[10] King v. Ainsworth, 225 Miss. 248, 83 So. 2d 97 (1955).

[11] Dunn, *Venue in the Circuit Court*, 29 MISS. L.J. 1, 4-5 (1957).

[12] Perry v. Nolan & Maris, 159 Miss. 384, 387, 131 So. 252, 253 (1930).

[13] Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 118-19 (1968).

[14] *Id.* at 119.

[15] MISS. CODE ANN. § 1859 (1956).

[16] Dunn, *supra* note 11, at 4.

[17] *See, e.g.*, Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730 (1957).

> cation, will not vest the court with territorial jurisdiction, and a default judgment based upon the ineffective service is voidable, if not void.[18]

It is apparent from many cases that if the venue of an action was improper in Mississippi, jurisdiction did not attach unless the defendant appeared and either directly or by his conduct waived any objection to venue. When venue was proper, the court had the requisite territorial jurisdiction.

The term "venue jurisdiction" has also been used by the Mississippi court.[19] References to venue jurisdiction have appeared in cases in which "process was not valid since not properly issued."[20] It is submitted that the terms "venue jurisdiction" and "territorial jurisdiction" have substantially the same meaning. Both connote that a failure of service on a resident defendant in the county of suit will deprive the court of the power to try the cause. In this writer's opinion, when our courts speak in terms of venue jurisdiction and territorial jurisdiction they are, in most instances, dealing with questions of venue. The use of these terms tends to conceal the real question at issue.

An examination of several Mississippi cases will illustrate the weight traditionally given to proper venue. In an 1841 case, *Bank of Vicksburgh v. Jennings,*[21] the plaintiffs sued multiple defendants on a promissory note made by the defendants and payable to the plaintiffs. Suit was filed in the Circuit Court of Warren County, and a writ issued to the sheriff of that county together with duplicate writs issued to the sheriff of Hinds County. The sheriff of Warren County returned the writ "not found as to all defendants." The sheriff of Hinds County returned the duplicate writs "executed on all the defendants." The defendants did not appear in the action, and a default judgment was taken against them. Subsequently all the defendants made affidavit to the Circuit Court of Warren County that they were resident citizens of Hinds County at the time the suit was brought, and the court set aside the default judgment, dismissing the cause for lack of jurisdiction. Affirming the lower court's action, the supreme court cited the applicable venue statute and said:

> The statute provides that the defendant in a transitory action may be sued in the circuit court of the county in which he may be found, and enacts that if a freeholder be sued out of the county of his residence and freehold, the venue may be changed by order of the court.[22]

Since suit was not brought in the proper venue, the judgment rendered against the defendants could not stand. No local defendant was served with process, therefore the duplicate writs were ineffective to bring the non-local defendants before the court.

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[18] Dunn, *supra* note 11, at 4.

[19] Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924).

[20] Daniel & Sams, *supra* note 6 at 36.

[21] 6 Miss. (5 How.) 425 (1841).

[22] *Id.* at 426.

In 1867 in *Wolley v. Bowie*[23] suit was filed in the Circuit Court of Copiah County against several defendants, none of whom were found in that county. A duplicate writ to Hinds County was returned "found" on Ann Wolley. The suit was dismissed to all other defendants, and judgment was taken against her. Reversing the judgment and ordering the cause dismissed for want of jurisdiction, the Mississippi Supreme Court said that "[n]one of the defendants having been found in Copiah county, [their] dismissal ousted the court of its jurisdiction of the cause."[24]

The court in 1896 restated the applicable law in *Campbell v. Triplett.*[25] Here the plaintiff sought a writ of attachment in the Circuit Court of Winston County. The writ was returned "no property found" in that county. Alias writs were issued to Attala and Leflore counties, but both returned "no property found." However, the defendant was served with process in Leflore County, the county of his household and residence. He did not appear, and a default judgment was taken against him. Reversing and dismissing the cause the supreme court said:

> The venue of civil actions of this class is in the county in "which the defendants, or any of them, may be found," and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach.[26]

Its position with reference to the effect of improper venue was reasserted by the court in 1924 in *Perry v. Nolan and Maris.*[27] Nolan and Maris brought suit in Hinds County against Frank Payne, Inc., a Mississippi corporation with its principal place of business in Hinds County, and J. R. Perry, a resident citizen of Warren County, in an action for debt upon an open account. Process was served on Frank Payne as an individual, but not upon Frank Payne, Inc. Process was served upon defendant J. R. Perry in Warren County. Judgment by default was rendered against both defendants, and execution issued against Perry in Warren County. Perry appeared at a later term of court and moved to quash the writ of execution and vacate the judgment as void, because it was rendered without process upon any defendant in Hinds County. Upon the hearing of this motion, Frank Payne, Inc. entered an appearance in court and waived all errors so far as it was concerned, consenting to the judgment previously rendered against it. The Hinds County Circuit Court then overruled Perry's motion, and he appealed. Citing the relevant venue statute, the supreme court reversed, stating: "The judgment was voidable, if not void, in this state of the record."[28] The court reasoned that Frank Payne was served as an individual, not as an officer of the corporation, and he as an individual was not a party to the action in any way. Therefore, the court had no jurisdiction of Perry, a resident citizen of Warren County, Mississippi.

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[23] 41 Miss. 553 (1867).

[24] *Id.* at 554.

[25] 74 Miss. 365, 20 So. 844 (1896).

[26] *Id.* at 367, 20 So. at 844.

[27] 159 Miss. 384, 131 So. 252 (1930).

[28] *Id.* at 387, 131 So. at 253.

As recently as 1957 in *Bryant v. Lovitt*,[29] the supreme court followed the general rule enunciated in the previous cases. Bryant was sued in Forest County, Mississippi, to recover a personal judgment for the value of merchandise sold to him by the plaintiffs. Bryant was not served with process in Forest County, but a writ did issue from Forest County to the sheriff of Jones County, the county of Bryant's household and residence. Service was effected upon him by leaving a copy of the summons with his wife under section 1859 of the Mississippi Code.[30] Bryant elected not to appear, and judgment by default was taken against him. Reversing this judgment, the supreme court agreed with Bryant's contentions that "he was not subject to suit in this type of action in Forrest County; that he had the right to be sued in the county of his residence and household, as provided by section 1433, and that the judgment against him is void."[31]

From the above cases, one can see that the Mississippi court's position has been uniform on judgments rendered by a court of improper venue. A resident defendant had to be served with process in the county of suit to vest the court with "proper venue," which was equated by our court with jurisdiction, territorial jurisdiction, or venue jurisdiction. Failure to obtain service in the forum county on any such defendant rendered a default judgment taken against a defendant void or voidable.

The other relevant venue statute, section 1441 of the Mississippi Code, which was adopted by our legislature in 1940, provides:

> Where an action is brought in any circuit, chancery, county, or justice of the peace court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs.[32]

Of the cases discussed above, only one, *Bryant v. Lovitt*,[33] was decided after the passage of this statute, and no mention was made of it in that opinion.

It is submitted that *Wofford v. Cities Service Oil Co.*[34] departs from established precedent and holds that section 1441 gives a court power to proceed where venue is improper, absent an appearance by a defendant seeking removal to the county of his household and residence. It is likewise submitted that the line of cases discussed above, although apparently in direct conflict with *Wofford*, were not specifically overruled by, nor even mentioned, in the opinion.

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[29] 231 Miss. 736, 97 So. 2d 730 (1957).

[30] MISS. CODE ANN. § 1859 (1956).

[31] 231 Miss. at 740, 97 So. 2d at 731.

[32] MISS. CODE ANN. § 1441 (1956).

[33] 231 Miss. 736, 97 So. 2d 730 (1957).

[34] 236 So. 2d 743 (Miss. 1970).

Cities Service Oil Company sued Robert Gilder, said to be a resident of Hinds County, and Robert Harmon and F. C. Wofford, resident citizens of Chickasaw County, in a county court in Hinds County. Gilder and Harmon were sued on an open account, and Wofford was sued on a bad check he wrote to pay off the account.

No service of any kind was ever made on Gilder, the alleged resident of Hinds County. The two Chickasaw County defendants, Harmon and Wofford, were served personally in Chickasaw County. They failed to appear in the suit, and a default judgment was taken against them on December 20, 1966. A year and a half later on July 3, 1968, prodded by writs of garnishment, they filed a motion to vacate the default judgment taken against them. The county court refused to vacate the default judgment, and the circuit court affirmed the ruling of the county court. The two men appealed to the Mississippi Supreme Court, assigning as error that "the original default judgment of the county court was null and void because no service of process was had on the Hinds County defendant, Robert G. Gilder."[35]

The court, citing section 1433[36] and section 1604,[37] declared that the requisite subject matter jurisdiction was present. The only question to be resolved was "venue jurisdiction."[38]

Section 1441 was then quoted in the opinion, and the cases of *King v. Ainsworth*[39] and *Ainsworth v. Blakeney*[40] were cited as cases properly interpreting that section. With these cases as a foundation, the court affirmed the default judgment, holding that "timely objection was not made as specifically required by statute, that venue was thus waived, and that . . . the judgment of the county court . . . should be and is now affirmed."[41]

No basis for the court's holding in *Wofford* is revealed by an analysis of *King v. Ainsworth*. *King* involved a replevin action wherein appellee obtained judgment for the possession of an automobile previously sold by appellee to appellant under a conditional sales contract, the terms of which were allegedly breached by non-payment of the last six installments. Appellant contended that the venue of suit was not in Smith County because no proof was offered that either the car or appellant were found in Smith County. The court said the record was sufficient to establish both, either of which would have permitted the suit to be brought under section 2843.[42] The court, stating it was not necessary to do so, did not set forth the evidence on the venue question. Of great significance was the fact that *the appellant made no objection to the jurisdiction of the court and filed no application for a change of venue,* and as the court pointed out:

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[35] *Id.* at 744-45.

[36] Miss. Code Ann. § 1433 (1956).

[37] Miss. Code Ann. § 1604 (Supp. 1968).

[38] 236 So. 2d at 745.

[39] 225 Miss. 248, 83 So. 2d 97 (1955).

[40] 232 Miss. 297, 98 So. 2d 880 (1957).

[41] Wofford v. Cities Service Oil Co., 236 So. 2d at 746.

[42] 225 Miss. at 250, 83 So. 2d at 98.

> *On the other hand he not only submitted to the jurisdiction by participating in the trial, but invoked the jurisdiction of the Circuit Court of Smith County by filing a counterclaim for damage. This constituted a waiver of any objection to the venue.*[43] (emphasis added).

The court's opinion that the venue was proper in *King* must be examined in the light of four relevant facts: (1) The defendant appeared in the action brought in the wrong venue; (2) the defendant entered no objection to the improper venue and did not seek to have the cause removed to the county of his residence; (3) the defendant participated in the trial by pleading to the merits; and (4) the defendant sought to assert a counterclaim against the plaintiff. It is respectfully suggested that this case merely holds that under this set of facts, venue was waived by the defendant, and that under section 1441 the court could not dismiss or transfer the action after the defendant had consented to trial in the improper venue and the jury had been impanelled.

The other case cited by the court to support its holding in *Wofford* was *Ainsworth v. Blakeney*.[44] This was a replevin action commenced in Smith County against several defendants, only one of whom was a resident of Smith County. This defendant, Burham Ainsworth, was held not to be a proper party to the action because "replevin lies alone against the party in possession at the time the action is begun."[45] Ainsworth did not have the required possession at the time of the commencement of the action. The court, however, held that venue had been waived by the other defendants, because they had appeared and participated in the action. The court supported its holding by pointing out that under "[s]ection 1433 Code of 1942, it is specifically required that an application for change of venue must be filed before the jury is impanelled."[46] It is submitted that at the time this statement was made, it held true only when a defendant who was sued in an improper venue appeared, and by pleading, consent, or asking for affirmative relief, waived the defect in venue. Until the jury was impanelled, the defendant could have the suit transferred to the proper venue; once the jury was impanelled, he was bound to trial in that county. Moreover, it should be noted that at the time of this decision the prevailing theory was that if the venue was improper, and the defendants did not appear, any default judgment taken against them was void or voidable.[47] In settling the venue question in this case the court held that, "[i]n the absence of timely objection by the defendants to the venue of Smith County, we think the question was not before the court. . . ."[48]

This "absence of timely objection" theory was used by the court in *Wofford* to explain why the default judgment should stand. It is readily apparent that this theory does little to justify the court's holding in *Wofford*. In *Ainsworth* the defendants appeared and waived any objections that existed as to improper venue. They raised the question of venue after half the trial was completed, and since they had appeared, they were no longer entitled to a change of venue under section 1433.[49] In *Wofford*, on the other hand, the defendants did not appear at all, and under the old line of cases, including *Bryant v. Lovitt*,[50] the provisions of section 1433[51] were not satisfied. The venue requirements of this section could be met only when a resident defendant was served with process in the county of suit. Absent service on such defendant, the court could not proceed to try a cause; therefore there could be no "absence of timely objection," since the defendants in *Wofford* were never brought within the terms of section 1433.[52]

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[43] *Id.* at 250-51, 83 So. 2d at 98.

[44] 232 Miss. 297, 98 So. 2d 880 (1957).

[45] *Id.* at 304, 98 So. 2d at 883.

[46] *Id.* at 306, 98 So. 2d at 884.

[47] *See, e.g.,* Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930).

[48] 232 Miss. at 306, 98 So. 2d at 884.

The pre-existing line of cases which explicitly spelled out the law prior to *Wofford* were not overruled or discussed in that opinion; so it is a valid assumption that they are still viable. On the other hand, *Wofford* is the most recent statement by our court in this area and should also be considered to be the law.

Therefore we have two conflicting rules of law with reference to improper venue and default judgments rendered by courts of improper venue. Under the old rule a default judgement taken in a county wherein no resident defendant was served with process, was void or voidable. Under the *Wofford* decision, a defendant is put under an affirmative duty to appear in the court of the county of suit and move for a change of venue. If he is a resident citizen of this state and is sued out of the county of his household, he must appear and at least assert his right to be sued in the county of his household, thus initiating removal. If he is served with process anywhere in the state and ignores it, he is subject to a default judgment which will be binding against him.

The *Wofford* decision raises many interesting questions. It appears to depart from the common law idea of territorial jurisdiction and hold that the process of a Mississippi court will be effective to bring a defendant before it as long as it is served on him anywhere in the state. If this is true, then the *Wofford* decision aligns Mississippi with a majority of the states, which provide either directly or by inference that process is valid throughout their state.[53] In most states the sole purpose of service of process is notice,[54] and the "purpose of venue is trial convenience."[55] As phrased by another writer, "The major purpose of service is to give the defendant notice of the action and a reasonable opportunity to defend."[56] The majority position is stated in *American Jurisprudence* as follows:

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[49] Miss. Code Ann. § 1433 (1956).

[50] 231 Miss. 736, 97 So. 2d 730 (1957).

[51] Miss. Code Ann. § 1433 (1956).

[52] *Id.*

[53] Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 Mich. L. Rev. 307, 325-26 (1951).

[54] *Id.* at 326.

[55] *Id.*

> Venue statutes relate to procedure, and not to jurisdiction, and the fact an action is tried in a county other than that declared by statute the proper county for its trial does not go to the jurisdiction and does not invalidate the judgment. . . . When a court has jurisdiction it has power, in the absence of an objection to the venue, to render a judgment binding on the parties.[57]

In a majority of the states "[f]ailure to make a timely objection in the proper mode to a failure to comply with the statutory requirement as to the district or county in which an action is to be brought is a waiver of that objection."[58]

The holding in *Wofford* will possibly cut out some needless litigation. Prior to *Wofford* a defendant could allow a default judgment to be taken against him and then set it aside by direct appeal or collateral attack, necessitating a new trial. Now, however, the default judgment will be binding on him. The burden is apparently placed on the defendant to appear in the action and either move for a change of venue or submit to the jurisdiction of the court.

The possible inequities this decision will work on future defendants do not appear too burdensome. It will cause inconvenience to a defendant sued in a county far removed from his household; he will be required either to engage a local attorney to make the long trip at the defendant's expense, or engage a local attorney and have him associate with an attorney in the county of suit to expedite removal, again increasing expenses.

As earlier indicated, *Wofford* has probably aligned Mississippi with the majority of states. Our process may now run throughout the state, free from theories of "territorial jurisdiction." When served with process, a defendant will have but three choices, (1) appear and move for a change of venue, (2) appear and submit to the jurisdiction of the court, or (3) not appear and allow a valid default judgment to be taken against him.

The major criticism of *Wofford* is not the result, but rather the fact that the court makes a bold statement of law completely opposite to pre-existing Mississippi law without adequately supporting or explaining its decision. No attempt is made to overrule, modify, or distinguish *Wofford* from the older line of cases. This leaves the attorney in Mississippi with two diametrically opposed rules on the same point of law, necessitating a "play it safe" approach to the problem.

It is hoped that when the court has this matter before it again the questions herein raised will be resolved.

Michael G. Soper

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[56] Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 120 (1968).

[57] 56 AM. JUR., *Venue*, § 38 (1956).

[58] *Id.* at § 36.

MISSISSIPPI PRODUCTS LIABILITY – A CRITICAL ANALYSIS

Frank L. Maraist and Rhesa H. Barksdale***

In the fifty odd years since it emerged from the ruins of MacPherson's now-famous Buick,[1] products liability has enjoyed phenomenal growth in American law. This branch of law, which dictates that the manufacturer or other seller of a product may be required to pay the damages caused by some quality or condition of his product, has now developed to a point at which it commands its own treatises[2] and specialists and dominates the broader field of personal injury litigation.[3] Yet in Mississippi, products liability law is still in infancy, its development thwarted by state supreme court decisions which clung until 1966 to the pre-*MacPherson* rule, which usually barred any recovery against the maker or seller of an injury-producing product.[4]

This long-enduring reluctance to open wide the door to products liability litigation has produced for Mississippi law the twin fruits of perplexity and promise. Lack of experience with the concept makes a products liability case a mystery to many Mississippi lawyers and judges, but this lack of litigation also presents the promise of products liability to Mississippi law, as it is unfettered by the chains of precedent which frequently obscure the purpose in permitting recovery against the manufacturer or other seller. This challenge makes timely an evaluation of the current status of Mississippi products liability law and the direction in which it is and should be moving.

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[1] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which greatly expanded the then existing liability of manufacturers for injuries caused by their products by abrogating the privity requirement for articles which were "reasonably certain to place life and limb in peril when negligently made . . . ." 111 N.E. at 1053. *See* text *infra.*

[2] Examples are L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1970) [hereinafter cited as FRUMER]; R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (1961); F. D. COSM. L. REP.; CCH PROD. LIAB. REP.

[3] *See* FRUMER § 1.

[4] *See* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied,* Yates v. Hodges, 386 U.S. 912 (1967) which adopted strict liability in tort for Mississippi and in strong dicta abrogated the privity requirement for negligence and perhaps for strict liability in warranty. *See* text *infra.*

In making this evaluation, one must first define the area of analysis. Products liability is a branch of a larger area of law which encompasses all liability arising out of present or past ownership or control of property, the condition or quality of which causes damages. In the case of real property, liability may be imposed upon a former owner who has delivered possession[5] or has retained it,[6] or upon the present owner in[7] or out of possession,[8] or upon the non-owner in possession,[9] under well defined branches of tort law. Similarly, when the property is a chattel, other branches of law impose liability upon the present owner in[10] or out of possession,[11] or upon the non-owner in possession.[12] What may be termed products liability, properly speaking, is the imposition of liability upon a former owner out of possession of a chattel for damages caused by some quality or condition of the chattel which existed prior to the time he parted with ownership and possession.[13] It is this area of Mississippi law which sprang almost full-bloom from the celebrated 1966 *State Stove*[14] decision and to which we direct our attention.

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[5] Mincy v. Crisler, 132 Miss. 223, 96 So. 162 (1923). Some states in recent years have applied products liability principles in imposing liability upon the builder-seller of improvements on real property for damages resulting from personal injuries caused by some quality or condition of the premises. *See* W. PROSSER, LAW OF TORTS, § 104 at 682 (4th ed. 1971) [hereinafter cited as PROSSER].

[6] Until he delivers possession to the buyer, the seller of real property remains the possessor, and liability is imposed upon him as possessor. *See* PROSSER § 57 at 351-52.

[7] West v. Williams, 245 So. 2d 591 (Miss. 1971); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524 (Miss. 1970); Strand Enterprises v. Turner, 223 Miss. 588, 78 So. 2d 769 (1955).

[8] Wilbourn v. Hardin, 234 So. 2d 606 (Miss. 1970); Kassis v. Perrone, 209 So. 2d 444 (Miss. 1968); Standard Oil Co., Inc. v. Decell, 175 Miss, 251, 166 So. 379 (1936).

[9] Langford v. Mercurio, 254 Miss. 788, 183 So. 2d 150 (1966); Strand Enterprises v. Turner, 223 Miss. 588, 78 So. 2d 769 (1955).

[10] Thompson v. Reily, 211 So. 2d 537 (Miss. 1968).

[11] The owner of a chattel who has leased it is liable for his negligence under ordinary tort principles. McQueen v. Ingalls Shipbuilding Corp., 229 Miss. 650, 91 So. 2d 740 (1957); Robertson v. Gulf & S.I.R.R., 171 Miss. 628, 158 So. 350 (1935). *See also* PROSSER § 104; at 676-78. Recent offorts to impose strict liability upon the lessor of a chattel through products liability theories have met with success. *See* PROSSER § 104 at 679.

[12] Milner Enterprises, Inc. v. Jacobs, 207 So. 2d 85 (Miss. 1968); Greenville Insulating Board Corp. v. McMurray, 164 Miss. 809, 145 So. 730 (1933).

[13] PROSSER defines products liability as "the liability of sellers of chattels to third persons with whom *they are not in privity of contract.*" (emphasis added). PROSSER at 641. This definition seems unduly restrictive when one considers that where the requirement of privity is waived, there should be no distinction in the legal tests for the liability of sellers who are in privity of contract with the injured consumer and those who are not.

[14] *See* note 4 *supra* and text *infra*.

The history of products liability law has been well-documented. Prior to MacPherson's famous ride through Schenectady,[15] both the manufacturer who sold his product through an independent retailer and the retailer himself usually escaped liability to the injured consumer through the application of settled legal principles. If the manufacturer did not deal directly with the injured consumer, they were not "in privity," and hence there were no rights or obligations flowing between them.[16] The manufacturer was required to pay the damages caused by his product only if the consumer first recovered judgment against the independent retailer, who then could seek indemnity against the manufacturer.[17] The consumer ordinarily could not recover from the retailer, however, as he could establish neither fault nor warranty on the part of such retailer.[18] Hence the consumer generally was left without recourse against any maker or seller for damages caused by some quality or condition of a product.

Prior to 1916 a series of decisions established an exception to the "privity" rule: privity was not required when the product was food, drugs or some other product intended for human consumption.[19] In *MacPherson* the New York court expanded this exception to encompass all products which, if defective, were likely to cause death or substantial bodily harm, thus permitting the injured consumer to bypass the usually innocent retailer and proceed directly against the manufacturer.[20] As

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[15] MacPherson purchased the vehicle in Schenectady and was injured when the left rear wheel collapsed. 145 N.Y. Supp. 462 (Sup. Ct. N.Y. 1914).

[16] *See* Prosser § 96 at 641-42; Frumer § 5.01.

[17] Prosser § 97 at 651.

[18] Prosser § 97.

[19] The landmark case is Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852) in which the wife purchased drugs which were administered to her husband and which resulted in his death. When suit was instituted against the retailer from whom the wife had purchased the drugs, the defendant sought to defeat recovery because he was not in privity with the husband. The court, holding the retailer liable despite the absence of privity, stated at 6 N.Y. 410, 57 Am. Dec. 459 that "[t]he defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement." The court earlier had stated that the "[t]he defendant's negligence put human life in imminent danger." *Id.* at 409, 57 Am. Dec. 459. *See* Prosser § 96 at 642; Frumer § 5.02.

[20] 217 N.Y. at 382, 111 N.E. at 1050. In an opinion by Justice Cardozo the court stated:

> We hold, then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. *If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.* Its nature gives warning of the consequences to be expected. *If to the element of danger there is added the knowledge that*

other American jurisdictions hastened to follow New York's lead, products liability unfettered by privity grew swiftly.[21] Initially liability was predicated upon one of two theories, a showing in tort that the manufacturer was "negligent" in placing the product upon the market[22] and a hybrid tort-contract[23] theory which imposed strict liability for breach of an express or implied warranty that the product was reasonably fit for its intended use.[24] By the late 1950's dissatisfaction with both of these theories led courts to adopt the theory of strict liability in tort, a modified version of absolute liability, as an additional theory of recovery.[25]

Mississippi, however, continued to require privity as in pre-*MacPherson* days,[26] waiving the requirement, both in negligence and in warranty, only when the product was food, drugs or some other product intended for intimate bodily use or, perhaps, where the sale was in viola-

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the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . . Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. *Id.*, 111 N.E. at 1053 (emphasis added).

In response to the defendant's attempt to distinguish between articles inherently dangerous and those imminently dangerous, *see supra* note 19, the court ruled that "the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent." *Id.*, 111 N.E. at 1055.

[21] FRUMER § 5.03.

[22] PROSSER § 96.

[23] FRUMER § 16.01 [1] at 3-3, 3-4.

[24] PROSSER § 97.

[25] *Id.* § 98; FRUMER §§ 3, 16A at 3-173. Absolute liability or "pure" liability without fault as employed herein connotes liability without regard to the alternatives available, the unreasonableness of the risk, the foreseeability of the accident and the foreseeability of the injury. All four may be required for negligence to exist, and the latter three may be required by the present doctrine of strict products liability in tort.

[26] Mississippi was the last state to accept the rationale of *MacPherson* and as noted by PROSSER, n. 23 at 643, never actually has accepted it, in that Mississippi went directly from pre-*MacPherson* concepts to strict liability in tort.

tion of a specific legislative prohibition.[27] Accordingly, suits against the maker or other seller for recovery of damages caused by a quality or condition of his product were rare until 1966, when the *State Stove* decision repudiated the concept of privity in products liability suits and adopted the modified version of absolute liability, termed strict liability in tort, as an alternate method of recovery.[28]

Products liability law in other states developed through judicial activitism. Courts, faced with legislative silence, adapted the traditional forms of the common law of tort and breach of warranty to impose liability upon manufacturers of injury-causing products.[29] This grudging battle to develop products liability through judicial decisions and without legislative aid was not without its toll upon the common law, and the result is a state of law which is in a large measure irrational and incomprehensible. While its late entry into the field could have spared Mississippi law this heavy toll, judicial decisions from the state supreme court indicate that we are permitting the state's products liability law to fall unnecessarily into the trap of antiquated theories of recovery and into the confusion produced by application of the sometimes illogical and mutually inconsistent rules of these theories. This conclusion can be demonstrated (1) by looking to the "theories" of products liability recovery, (2) by discerning the rationale of products liability and the questions common to all products liability suits, and (3) by evaluating the Mississippi decisions in the light of that rationale. First, a look at the three "theories" of recovery.

Negligence

As we have seen, early attempts to impose liability through negligence upon the sellers or other manufacturers of injury-causing products generally failed because the negligent manufacturer usually was not "in privity" with the injured party and the seller who was in privity, the retailer non-manufacturer, usually was free from fault. The subsequent demolition of the barrier of privity by *MacPherson* and its progeny led to unlimited imposition of liability upon any seller, including the remote manufacturer, who was negligent in placing upon the market a product which could reasonably be expected to cause death or substantial bodily harm if it were defective.[30] Courts have recognized a wide range of negligent acts which may give rise to liability, including negligence in designing, constructing, assembling, inspecting, testing or labeling the product and in failing to warn the consumer of a "dangerous" quality or condition of the product.[31] In addition to a showing of negligence, i.e., duty-breach, the injured person must prove causation, i.e., that the product did in fact leave the manufacturer's or seller's hands with a certain quality or in a certain condition, and that the quality or condition was the proximate cause of the damages.[32]

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[27] For a summary of products liability in Mississippi prior to the adoption of strict liability in tort *see State Stove,* 189 So. 2d at 116-19.

[28] Discussed in text *infra.*

[29] PROSSER §§ 96-97.

[30] *Id.* § 96; Frumer § 5.03 at 32.

Prior to 1966, however, the manufacturer of a product, the condition or quality of which caused damage to the consumer or user, was not liable under Mississippi law for his negligence in placing the product upon the market unless (1) he was "in privity", i.e., sold directly to the plaintiff,[33] or (2) the product was one intended for intimate bodily use, such as food, beverages, condiments, drugs, or, in the famous *Pillars* case, chewing tobacco,[34] or (3) if, perhaps, the sale was in deliberate violation of a safety statute.[35] The retailer who was "in privity" with the injured purchaser was not liable unless he was negligent[36] or adopted the product as his own,[37] or was guilty of fraud[38] or of some independent act of negligence in making the sale.[39] He ordinarily escaped liability for negligence because the product was purchased in a "sealed container" or from a "reputable dealer", and he was under no duty to inspect the goods before sale.[40] Third persons other than the purchaser could not recover from either the retailer or the remote manufacturer unless the product fell within the exceptions to privity outlined above.[41]

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[31] *Id.* § 96 at 644; Frumer §§ 6 through 10.03.

[32] *Id.* § 103 at 671-72; Frumer §§ 11.01 through 11.02.

[33] Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962); E. I. DuPont deNemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954); Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928) *overruled* 189 So. 2d 113 (Miss. 1966); Kilcrease v. Galtney Motor Co., 149 Miss. 703, 115 So. 193 (1928).

[34] Cox v. Laws, 244 Miss. 696, 145 So. 2d 703 (1962); Cone v. Virginia-Carolina Chemical Corp., 178 Miss. 816, 174 So. 554 (1937); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

[35] Cox v. Laws, 244 Miss. 696, 145 So. 2d 703 (1962). As the product sold (drug) fit within the "inherently dangerous" exception to the privity requirement, the reference to the violation of a safety statute in imposing liability was dictum but the court strongly implied that the illegal act of sale standing alone would be a sufficient basis for imposition of liability without privity.

[36] *See* Kroger Groc. Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933). Though the suit was brought for breach of an implied warranty, the opinion contains a good discussion of when retailers would be held liable for negligence.

[37] Elmore v. Grenada Groc. Co., 189 Miss. 370, 197 So. 761 (1940); Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935).

[38] W. T. Pate Auto Co. v. W. J. Westbrook Elevator Co., 142 Miss. 419, 107 So. 552 (1926).

[39] J. C. Penney Co. v. Morris, 173 Miss. 710, 163 So. 124 (1935).

In *State Stove* the supreme court with forceful dicta swept away the requirement of privity in all products liability suits based on negligence. The court wrote:

> Privity of contract between a consumer of a product and its manufacturer has not only been abandoned by every state in the Union, except Mississippi, but it has no rational basis for continuance in such an action in this jurisdiction . . . . *The rule which we adopt extends to any product which, if in fact negligently made, may reasonably be expected to be capable of inflicting injury. Privity of contract is not necessary in a suit by a consumer against a manufacturer* . . . .[42]

and

> In summary, Ford Motor Company v. Myers expressly required privity of contract in a suit by a consumer against a manufacturer. It is hereby overruled. E. I. DuPont de Nemours Co. v. Ladner, Cox v. Laws, Harrist v. Spencer-Harris Tool Company, and Triplett v. American Creosote Works were all decided on grounds not connected with the obsolete privity-of-contract doctrine. In fact, they all rendered caveats to the applicability of this doctrine in Mississippi.
>
> *Since privity of contract is not essential in a suit by the consumer against the manufacturer,* the next issues are (a) the basis and theory of liability of a manufacturer to a consumer for a defective product, and (b) whether the requirements of the appropriate theory exist in this action. . . .[43]

Because of the availability of the seemingly more liberal theory of strict liability in tort, few Mississippi cases since 1966 have sought recovery under the theory of negligence. In those cases the court has ignored the question of privity but has denied recovery by finding an absence of negligence.[44] Thus while there is no decision in Mississippi permitting recovery against the seller in negligence without privity except within pre-*MacPherson* exceptions to the privity requirement, it is apparent that the requirement of privity is no longer applicable in suits based upon negligence.

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[40] *See* Kroger Groc. Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

[41] Kilcrease v. Galtney Motor Co., 149 Miss. 703, 115 So. 703 (1928).

[42] 189 So. 2d at 116 (emphasis added).

[43] *Id.* at 118 (emphasis added).

[44] *See* Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd* 450 F.2d 1176 (5th Cir. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); Creel v. General Motors Corp., 233 So. 2d 105 (Miss. 1970) (sued alternatively in negligence).

The few Mississippi cases involving negligence in the manufacturing process have recognized the right of recovery for negligent manufacture,[45] design[46] and failure to warn,[47] and there is nothing to indicate that the law in this area should not grow to at least the same proportions as those reached in other states which earlier abandoned the requirement of privity. In theory, Mississippi law should permit products liability recovery beyond that usually allowed in negligence suits in other jurisdictions because of the state's unique "pure" comparative negligence concept.[48] For example, in states in which contributory negligence is a bar to recovery, it may be proper to hold that there can be no recovery for injuries caused by "obvious defects,"[49] but such a holding appears questionable in Mississippi where the legislature has decreed that the contributing fault of the injured person, no matter how great in degree, may only reduce but not defeat recovery against a wrongdoer.[50] Unless the conduct of the plaintiff in failing to protect himself from injuries caused by the patently dangerous condition rises to the level of assumption of risk, it should not bar recovery in Mississippi; hence a blanket rule that there is no liability for "obvious defects" may be an improper judicial circumvention of legislative policy. In developing Mississippi law, however, the courts have as yet failed to recognize this rationale and have held that there is no duty to warn of negligent design where the offending quality or condition of the product is open and obvious.[51]

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[45] Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[46] Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd* 450 F.2d 1176 (5th Cir. 1971); Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[47] Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (5th Cir. 1969); Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[48] *See* MISS. CODE ANN. § 1454 (1956). *See also* text *infra.*

[49] Even this holding may sometimes be questionable when one considers that it may be foreseeable that the injury will occur to a child who is otherwise incapable of being guilty of contributory negligence or assumption of risk. *See, e.g.,* Hood v. Formatron Corp., 2 CCH PROD. LIAB. REP. ¶ 6576.

[50] *See* text *infra.*

[51] Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1186-88 (5th Cir. 1971); Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 95, 140 So. 2d 558, 562 (1962).

STRICT LIABILITY IN WARRANTY BEFORE THE UCC

Prior to the adoption of legislation covering warranty,[52] the common law permitted limited recovery by a purchaser or consumer for damages resulting from breach of warranty under this rationale: one who sold property could warrant or guarantee the buyer that the property contained certain qualities or was in a certain condition and if this guarantee was breached, the seller was bound to pay the damages resulting therefrom.[53] The warranty could be one expressly made by the seller,[54] but the seller also could be deemed by operation of law to have warranted that the property which he sold was reasonably fit for the use for which it was intended.[55] In either event, if the warranty was made and breached, the negligence of the seller was immaterial, and he was held strictly liable for damages caused by the breach of the warranty.[56]

In Mississippi as elsewhere, suits were brought for breach of warranty by persons who sustained damages from "defects" in chattels, but the court in applying warranty principles reached basically the same conclusions as it did when recovery was sought in negligence.[57] If the remote manufacturer was sued in warranty, recovery usually was denied upon the rationale that warranty—rooted at least in part in contract law—did not extend to any party who was not in privity of contract with the seller.[58] As with negligence, the court waived the requirement of privity in warranty cases involving products such as foods, drugs, or other products intended for intimate bodily use by holding that in these limited cases the warranty ran with the product through all subsequent parties and to the injured party.[59] Where there was privity, i.e., suits between the retailer and his purchaser, the law provided that there was no implied warranty unless the seller made the product,[60] or was guilty of fraud,[61] or negligence,[62] or adopted the product as his own.[63]

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[52] The UNIFORM SALES ACT (1906), never adopted by Mississippi, and the UNIFORM COMMERCIAL CODE (1951).

[53] PROSSER § 97, FRUMER § 16.01[1] at 3-4.

[54] PROSSER at 651-53; FRUMER §§ 16.01[1] at 3-6, 16.04[4].

[55] PROSSER at 653-55; FRUMER, §§ 16.01[1] at 3-6, 16.04[2].

[56] PROSSER at 650-51; FRUMER § 16.01[1] at 3-4, 3-6, 3-7.

[57] *See* text *infra*. The oft comingling of negligence and warranty is demonstrated in Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962), and in Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935).

[58] Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922).

[59] Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[60] Stribling Bros. Mach. Co. v. Girod Co., 239 Miss. 488, 124 So. 2d 289 (1960); Watts v. Adair, 211 Miss. 777, 52 So. 2d 649 (1951); Industrial Fin. Corp. v. Wheat, 142 Miss. 536, 107 So. 382 (1926); P. D. Bellville Supply Co. v. Dacey, 141 Miss. 569, 106 So. 818 (1926).

Where the foregoing factors did not bar the suit, recovery could be had under an implied warranty which arose either if (1) the buyer purchased the item for a particular purpose, which was disclosed to the seller prior to the sale,[64] or (2) the item was not reasonably fit for its normal intended purpose.[65] Where the plaintiff claimed a breach of this implied warranty, he was required to prove that there was a defect and that it existed at the time of the sale—even though it may not have been fully developed at that time—and that the defect caused the resulting damages.[66] The buyer was required to give the seller reasonable notice of the breach.[67] More importantly, the implied warranty could be negatived by a disclaimer of any warranty or by the more restrictive terms of an express warranty.[68] If the buyer continued to use the product after discovery of the breach, his recovery in warranty was limited to damages arising before such discovery.[69]

STRICT LIABILITY IN TORT

Although destruction of the privity barrier subjected all negligent sellers to liability to the injured consumer, courts in some states recognized that the rationale of permitting recovery against the manufacturer of a product or against the non-manufacturer who was in the business of selling a product rested not upon the commission of a wrongful act, but upon the determination that each product should be made to bear the costs of the accidents resulting from its use.[70] Warranty was rejected as a means of imposing this liability without fault because the contract-oriented rules of warranty obscured the rationale and created irrelevant barriers to recovery.[71] As a result the courts sought some satisfactory theory under which liability could be imposed upon manufacturers without regard to negligence concepts and without the limiting rules of warranty. An apparent solution came with Section 402A of the *Restatement of Torts Second,* which would impose absolute liability without fault but only if the product was "defective" and "unreasonably dangerous."[72] In the memorable *State Stove* decision in 1966 in which the late Chief Justice Ethridge wrote both the majority and dissenting opinion, the Mississippi Supreme Court, the last state to require privity in negligence suits, leaped to the forefront among states adopting strict liability in tort as a basis of recovery. The conditions under which a manufacturer or other seller may be held strictly liable in tort as set forth in Section 402A of the Restatement and adopted by the Mississippi Supreme Court in *State Stove* are:

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[61] Watts v. Adair, 211 Miss. 777, 52 So. 2d 649 (1951); P. D. Bellville Co. v. Dacey, 141 Miss. 569, 106 So. 818 (1926).

[62] Kroger Groc. Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

[63] Elmore v. Grenada Groc. Co., 189 Miss. 370, 197 So. 761 (1940).

[64] Ralston Purina Co. v. Howell, 254 So. 2d 911 (Miss. 1971) (cause of action arose before adoption of UCC in Mississippi); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[65] Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[66] Foster v. Copiah County Co-Op, 246 Miss. 218, 148 So. 2d 702 (1963); Coca-Cola Bottling Co. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956).

[67] Lumbermen's Supply Co. v. Poplarville Sawmill Co., 117 Miss. 274, 78 So. 157 (1918).

[68] Stribling Bros. Mach. Co. v. Girod, 239 Miss. 488, 124 So. 2d 289 (1960); Industrial Fin. Corp. v. Wheat, 142 Miss. 536, 107 So. 382 (1926). *See* Note, *Commercial Law—Disclaimer of Warranties Under the Uniform Commercial Code,* 40 MISS. L.J. 310 (1969).

[69] F.M.C. Corp. v. Strebeck, 196 So. 2d 74 (Miss. 1967); Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[70] *See* concurring opinion of Chief Justice Traynor in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). The landmark case in this area is Greenman

1) the seller must be engaged in the business of selling such a product, and

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v. Yuba Power Products, Inc., 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962). The move from no recovery in Winterbottom v. Wright, 10 M&W 109, 152 Eng. Rep. 402 (1842), to limited recovery prior to *MacPherson* to recovery for all injuries caused by negligence in the manufacturing process to attempts to impose upon the manufacturer liability without fault may present the classic case of the law adapting to changes in social values and economic conditions, i.e., from a need to subsidize industry to a recognition that the making of safer products must be encouraged and finally to a realization that if an industry cannot make an accident-free product, then the industry and the users of its product should be made to bear the costs of the injuries caused by the product.

[71] PROSSER § 98 at 656; FRUMER 16A[1] at 3-173; *See State Stove,* 189 So. 2d at 119, *citing* PROSSER among others, and *quoting* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

[72] RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See* FRUMER § 16A[2] at 3-177. Section 402A imposes liability upon the manufacturer or seller if the product left the seller's hands in a defective condition unreasonably dangerous to the consumer, and only if it was expected to reach and did reach the consumer without substantial change. These qualifications prevent imposition of absolute liability without fault, and the extent to which they produce anything other than negligence depends upon the manner in which they are interpreted. The prevailing interpretation, according to PROSSER, is that the product must "meet the reasonable expectations of the ordinary consumer as to its safety." PROSSER § 99 at 659. From this point it seems a simple step to say that the manufacturer must have acted as a reasonable man in placing the product upon the market, i.e., negligence. The Mississippi Supreme Court has interpreted the provision simply as requiring a finding of duty and eliminating only the necessity of showing a breach of duty, which is superfluous in negligence actions, and hence equating strict products liability with a finding of negligence. *See* text, *infra.*

> 2) he must sell it in a defective condition unreasonably dangerous to the user or consumer, and
> 3) the product must be expected to reach and must reach the consumer without substantial change.[73]

In adopting 402A, the court interpreted its provisions as requiring additionally that the plaintiff must have been injured "as a result of a contemplated use of [the product]."[74]

Three years after *State Stove,* in *Walton v. Chrysler Motor Corp.,*[75] the court interpreted these prerequisites to mean that there must be a finding of (1) a "duty" by the manufacturer to the injured party not to place upon the market a product which, given its intended use, is in an unreasonably dangerous condition; (2) a breach of that duty; and (3) proof that the unreasonably dangerous condition caused the damages.[56] If the "duty" and "breach" concept added in *Walton* simply means that there is a duty and a breach when the requirements of 402A are met, then the conflict may simply be one of semantics, but if, as subsequent Mississippi cases indicate, "duty-breach" is synonymous with a finding of negligence, the court may have eradicated recovery through strict liability in tort from Mississippi products liability law.[77]

To the extent to which it still exists, strict products liability in tort in Mississippi has begun to take definite shape. In *State Stove* the court applied strict liability in tort to both the manufacturer and the assembler-seller but denied recovery against the manufacturer because the product did not leave the manufacturer's hands in "a defective condition unreasonably dangerous to the user or consumer or to his property,"[78] "it was not expected to and did not reach . . . [the consumer] without a substantial change in the condition in which it . . . (was) sold,"[79] and the negligence of the assembler-seller was the "intervening, sole proximate cause"[80] of the accident. In *Walton*[81] the court rejected the contention that a product was unreasonably dangerous because it did not guard against "second accidents," impliedly holding that the unreasonably dangerous condition must contribute to the occurrence of the accident and not merely to aggravation of the damages.[82] In *Falstaff Brewing Corp. v. Williams*[83] the court applied the strict liability theory to accidents caused by the quality or condition of the container in which the product is sold. A recent supreme court decision, *Pridgett v. Jackson Iron & Metal Company,*[84] apparently held that strict liability in tort does not extend to the sale of used products and implied that where the seller is engaged in the sale of more than one product, strict liability will attach only to those products whose sale constitutes the "chief function" of the seller. In the latest decision, *Sam Shainberg Co. v. Barlow,*[85] the court held that strict products liabiility in tort cannot be applied to the retailer who is solely a conduit for the product[86] and perhaps implied that it cannot be applied to anyone under Mississippi law.[87]

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[73] RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as 402A]. *See State Stove,* 189 So. 2d at 118, 121.

[74] 189 So. 2d at 118, 121.

[75] 229 So. 2d 568 (Miss. 1969).

[76] *Id.* at 573.

[77] In *Walton,* 229 So. 2d at 573 the court stated:

> The strict liability rule for products liability cases adopted by this Court *eliminates the necessity to show negligence* in the manufacture of the product where it is shown that the product left the hands of the manufacturer in a defective condition . . . . [emphasis added].

The court had earlier stated in Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969) ·

> The doctrine of strict liability in tort is strict in the sense that there is no need to prove that the manufacturer was negligent. [*Id.* at 641].

In *State Stove* the court made the statement that strict liability "is strict in the sense that there is no need to prove that the manufacturer was negligent." 189 So. 2d at 120. In spite of this language which clearly abrogates, for recovery in strict liability in tort, the need to find negligence, the court is now impliedly holding that negligence must be found. *See* text *infra.*

Other states which have adopted the theory of strict liability in tort have differed on whether such liability is limited to the ultimate purchaser, "users" or "consumers," or whether it also extends to any injured bystander.[88] The Mississippi court has followed the restatement

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[78] 189 So. 2d at 121, *quoting* § 402A.

[79] *Id.*

[80] *Id.*

[81] 229 So. 2d 568 (Miss. 1969).

[82] At 229 So. 2d 573, the court upheld this policy decision by holding that though under strict liability in tort there was no need to prove negligence on the part of the manufacturer, it was necessary that the manufacturer owe a duty to the plaintiff and that manufacturers do not have a duty to protect against second accidents. *See* text *infra.*

[83] 234 So. 2d 620 (1970). *See* text *infra.*

[84] 253 So. 2d 837 (Miss. 1971). *See* text *infra.*

[85] #46, 513 [2 CCH PROD. LIAB. REP. ¶ 6720] (Miss. Feb. 15, 1972).

[86] *See* text *infra.*

[87] As disscussed *infra,* concepts of negligence seem to be reasserting themselves in strict liability in tort decisons, the court's statements in *Walton, Dees* and *State Stove* notwithstanding. *See* text *infra.*

[88] § 402A offers protecton "to the user or consumer or to his property . . . ." *Comment 1* to § 402A defines "consumer" and "user" as follows:

> "Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts

by extending such protection at least as far as purchasers and other "users,"[89] but has not squarely faced the question of application of the concept to bystanders.[90]

The Adoption of the Uniform Commercial Code and The Residue of Warranty

As we have seen, the limited application of warranty principles to products liability cases was designed to circumvent two barriers to recovery through negligence: (1) the necessity that there be some fault on the part of the manufacturer or seller, and (2) the difficulty of proving that some negligent act did in fact occur.[91] With the adoption in Mississippi of the doctrine of strict liability in tort, the continued application of warranty principles to products liability cases was un-

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> tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Arizona, California, Connecticut, and Indiana (federal court) have awarded verdicts to bystanders under strict liability in tort, while New York has denied such liability. 1 CCH PROD. LIAB. REP. ¶ 4200, 4201. *See* FRUMER § 16A[4][c].

[89] In Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969), both the purchaser passenger in a truck ("purchaser/user") and the driver of the truck ("user") recovered in strict liability in tort. A "user", i.e. a sales person preparing to deliver the product to the purchaser-consumer, recovered in Falstaff Brewing Corp. v. Williams, 234 So. 2d 620 (Miss. 1970) when injured by flying glass from a bottle of beer which exploded when she slid back the cooler door to get the bottle.

[90] In Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968), Cockrell, a city employee, was injured after he went to investigate smoke coming from the hood of a city truck driven by another when the truck moved forward, injuring Cockrell. As Cockrell was not the driver of the defective truck, it can be argued he was not a "user" but a "bystander", but it can also be argued that by taking affirmative action, as in *Falstaff,* Cockrell lost his "bystander" status and became a "user". The court made no classification, and as demonstrated in note 89 and as discussed *infra,* there should be no need for such classifications.

[91] PROSSER § 97 at 650-51. Courts also frequently relieved the injured consumer of the burden of proving that some negligent act occurred by application in negligence actions of the doctrine *res ipsa loquitur.*

necessary.[92] Yet the Mississippi legislature in adopting in 1966[93] the Uniform Commercial Code, which became effective March 31, 1968,[94] chose to retain warranty as a mode of recovery in products liability.[95] It also opted to abrogate the earlier restrictions on the scope of the warranty made by a seller non-manufacturer,[96] and to expand the waiver of privity in claims against a retailer by selected injured parties while remaining silent as to the requirement of privity between other parties in the chain of title from the manufacturer to the injured party.[97]

Under the Mississippi version of the UCC, a seller warrants the goods he has sold either (1) by making an express warranty,[98] or, (2) if the buyer makes known to the seller the particular purpose for which the goods are purchased, and relies upon the seller's judgment in furnishing such goods, then the buyer warrants that the goods are fit for that particular purpose,[99] or (3) if the seller is a merchant with respect to the goods sold, he will be held to have made an implied warranty of merchantability that the goods are fit for the ordinary purposes for which they are used.[100] The requirement of notice has been retained.[101] The Mississippi legislature failed to adopt proposed section 2-316,[102] which

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[92] Strict liability in tort was adopted for the express purpose of providing liability wthout fault without resort to warranty principles, which were found to be unsatisfactory. *See* Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 377 P.2d 897 (1962), and the portions thereof quoted in *State Stove,* 189 So. 2d at 119.

[93] Gen. Laws Miss. ch. 316 (1966).

[94] *Id.* § 10-101.

[95] Miss. Code Ann. §§ 41A:2-313 to 41A:2-318 (Spec. Supp. 1967).

[96] *Id.* § 41A:2-314 states:

> (1) Unless excluded or modified, a *warranty that the goods shall be merchantable is implied* in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . [emphasis added].

As discussed *supra* the pre-UCC common law rule was that there was no implied warranty by a seller unless he manufactured the product, or was guilty of fraud, or negligence, or adopted the product as his own.

[97] *Id.,* § 41A:2-318 states:

> A seller's warranty whether express or implied extends to *any natural person* who is in the family or household of *his buyer* or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> While the waiver of privity extends to every seller, it is unlikely that any seller other than the retailer will be sued in products liability by a natural person in the household of his buyer. [emphasis added]

[98] *Id.* § 41A:2-313:

(1) Express warranties by the seller are created as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods, or a state-

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ment purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

[99] *Id.,* § 41A:2-315:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

For discussion of § 2-315, *see* Garner v. S & S Livestock Dealers, Inc., 248 So. 2d (Miss. 1971).

[100] *Id.,* § 41A:2-314:

> (1) Unless excluded or modified, a waranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
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> (2) Goods to be merchantable must be at least such as
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> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and
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> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified other implied warranties may arise from course of dealing or usage of trade.

[101] MISS. CODE ANN. § 41A: 2-607 (Spec. Sup. 1967).

[102] UNIFORM COMMERCIAL CODE § 2-316 (American Law Institute 1962).

> Section 2-316. Exclusion or Modification of Warranties.
>
> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

would have permitted limited disclaimer of warranty by the seller, with the result that Mississippi law on this point is unclear. The legislature's rejection of proposed section 2-316 may mean either that the pre-UCC common law rule, which permitted broad disclaimer, remains in effect, or that the legislative inaction was intended to bar any disclaimer of warranty by the seller.[103] The provisions of the UCC also abrogate the common law rule that a seller who did not make the product is not liable in warranty unless he is guilty of negligence or fraud or adopts the product as his own.[104]

The Mississippi statute abolishes the requirement of privity in warranty only between a seller—whether he is the manufacturer or not—and his immediate purchaser[105] and, *in personal injury cases,* toward the members of such purchaser's family or household, or his guests.[106]

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(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

[103] In adopting Sections 2-314 and 2-315 of the UCC, the legislature failed to delete language providing that implied warranty would arise under certain conditions "unless excluded or modified." The failure may have been an oversight in draftsmanship, but it also may indicate a legislative intent to reject the UCC disclaimer provisions in favor of either the prior common law rule or to give the courts the power to formulate new rules for disclaimer. Note, *Commercial Law—Disclaimer of Warranties Under the Uniform Commercial Code,* 40 Miss. L.J. 310 (1969).

[104] *See* notes 58-62 *supra.*

[105] Miss. Code Ann. § 41A: 2-314 (Spec. Supp. 1967).

[106] *Id.,* § 41A: 2-318.

The statute does not speak to the common law requirement of privity in other cases, and hence that requirement continues to bar all other suits in warranty unless: (1) the "food and drug" exception established in the *Lyons* case is still viable and is applicable, or, (2) as is possible, the dicta of the court in *State Stove* effectively swept away any requirement of privity in warranty as well as in tort.[107]

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[107] The status of privity in warranty, beyond the limited waiver against the retailer as provided by § 2-318, is unclear. It may be contended that *State Stove* waived privity in all products liability suits based upon warranty. *Compare the* language of *State Stove* quoted *supra* in text with the following language of Justice Ethridge in the same case:

> Breach of warranty is associated with contract law, and traditionally requires some promise or undertaking express or implied. The idea of a warranty introduces quite unnecessary complications into the liability of a manufacturer to a consumer. *In the absence of privity, the liability is in tort and not in contract,* and a concept of warranty from the contract law of sales is irrelevant. 189 So. 2d 119 (emphasis added).

Accord, Denman v. Armour Pharmaceutical Co., 322 F. Supp. 1370, 1374 (N.D., Miss. 1970).

Assuming that the court in *State Stove* did intend to waive any requirement of privity in warranty, did the legislative adoption of the limited version of waiver of privity in § 2-318 abrogate such a rule? At the time of adoption, the legislature chose the restrictive Alternative A (*see supra* note 96) in lieu of the following alternatives:

> Alternative B
>
> *A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.*
>
> Alternative C
>
> *A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.* [emphasis in text]. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UCC, 13 (American Law Institute and Nat'l Conference of Commissioners on Uniform State Laws 1967).

The alternatives which the legislature rejected would have provided a broader waiver of privity to the retailer similar to that provided by 402A of the restatement and adopted in *State Stove.* The official comments to the proposed Section 2-318 of the UCC at the time the legislature adopted it read:

> 2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity". It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for

The failure of the supreme court to expand strict liability in tort to its fullest boundaries and the failure of the legislature wholly to accept or reject warranty as a basis of recovery in products liability suits has left Mississippi law with a viable residue of warranty law. A most important residue of warranty results where the seller represents that the product is of a higher quality or safer condition than merely not "unreasonably dangerous", i.e., express warranty or the implied warranty of fitness for a particular purpose.[108] In such cases, warranty will permit recovery where strict liability in tort may not. Such matters, however, spring purely from an agreement, express or implied, between the parties, and cannot properly be analogized to products liability in tort. That aspect of warranty liability which may be analogized to tort is the implied warranty of merchantability, i.e., that the goods are reasonably fit for the ordinary purposes for which they are used. This implied warranty of merchantability may afford protection where strict liability in tort will not. First, it is not clear whether strict liability in tort affords protection to bystanders and others who may not be classified as "users" or "consumers"; warranty seems to provide such protection, at least against the retailer in personal injury suits by bystanders who are members of the household or guests of the ultimate purchaser.[109] Secondly, there may be overlapping recovery, i.e., in cases where privity is waived in warranty and, at the same time, the quality or condition of the product gives rise to strict liability in tort. Thirdly, where the injured party claims against the retailer who did not make the product, warranty sometimes provides

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> the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.
>
> 3. The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. *Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person. Id.* at 14. (emphasis added).

The UCC was adopted shortly prior to *State Stove,* but did not take effect until almost two years after the decision. Even if the court intended in *State Stove* to abrogate all privity in products liability matters based upon warranty, the legislative intent from the adoption of § 2-318 could be interpreted as negating such a broad waiver.

[108] *Id.* § 41A:2-313.

[109] MISS. CODE ANN. § 41A:2-318 (Spec. Supp. 1967).

liability without fault where such liability would otherwise be denied by application of the principles of negligence or strict liability in tort. Lastly, if *State Stove* swept away all privity in warranty as well as in tort,[110] then any injured party perhaps can recover under the theory against the remote manufacturer if the product is not fit for the use for which it is intended, making warranty the broadest theory of recovery and perhaps rendering superfluous both negligence and strict liability in tort except in those cases in which warranty has been validly disclaimed or in which reasonable notice of breach has not been given.[111]

THE LEGACY OF JUDICIAL ACTIVISM AND LEGISLATIVE PASSIVISM

The development of products liability through judicial activism and legislative passivism has left us with three "theories" of recovery, and the varying rules of these theories, many of which are irrelevant to the questions at hand, have produced the confusion, injustice and lack of clearly-defined purpose which abound today. Imposition of liability, as it now stands in Mississippi and in other American jurisdictions, hinges upon (1) the theory of the plaintiff's case[112] and (2) the application of the rules of that theory to such factors as the status and conduct of the parties,[113] the conduct of intervening actors,[114] the nature and use of the product in question[115] and the type of damages sustained.[116] While some of these factors may be relevant to imposition of liability when the goal of products liability law is ascertained, their treatment by the varying rules of the three theories of recovery often produces results which are inconsistent and irrational. For example, let us examine how the status of the plaintiff and of the defendant may produce differing and inconsistent results in Mississippi under the three "theories" of products liability law.

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[110] *See* note 107 *supra.* An interesting argument is whether interpretation of the legislative intent, i.e., the deliberate choice of the most restrictive of the waiver of privity clauses in the UCC, should nullify the court's move toward absolute waiver of privity in products liability suits sounding in tort. The arguments include: (1) the legislature, given the chance to adopt alternatives B or C for § 2-318, chose the more restrictive alternative A and thus expressed a policy of limited waiver of privity in all suits caused by defective products; (2) the legislature in adopting the UCC sought only to limit the waiver of privity in warranty, and did not intend to affect the developing tort concepts, and (3) the language of the comments following § 2-318 in the official text of the UCC indicate a delegation to the court of development of waiver of privity both in contract and in tort.

[111] *See* text *supra.*

[112] Whether recovery is sought under negligence, strict liability in tort, or strict liability in warranty, or as is often the case, a combination of the above. *See* text *supra.*

[113] *See* PROSSER § 100 as to the status of the parties and §§ 96-99, 102 as to conduct. *See* text *infra.*

[114] State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Triplett v. American Creosote Works, 251 Miss. 727, 171 So. 2d 342 (1965); E. I. DuPont deNemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954). *See* FRUMER §§ 11.04A, 16.01[4].

[115] Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837 (Miss. 1971); Ralston Purina Co. v. Howell, 254 So. 2d 911, 913 (Miss. 1971). *See* PROSSER § 101.

If the injured party is the *purchaser,* he may recover against the non-manufacturer seller, i.e., *retailer,* (1) in strict liability in warranty without more;[117] (2) in negligence, only if he can show some wrongful act beyond the act of selling[118] and (3) in strict liability in tort, probably not at all.[119] If the *purchaser* is proceeding against the *manufacturer* non-retailer, then he may recover (1) in negligence, only if he can show some negligent act beyond the mere sale;[120] (2) in warranty, either in all cases[121] or perhaps only if the product is one designed for intimate bodily use,[122] and (3) in strict liability in tort, only if the requirements of section 402A of the *Restatement of Torts* are met and if the product is being used in a foreseeable manner at the time it caused the injury,[123] and perhaps only if there is also a showing that the manufacturer was negligent.[124] If the injured party is not the ultimate purchaser but merely a *user* or *consumer,* then he may recover from the *retailer* (1) in negligence if he can demonstrate some wrongful act beyond the mere sale;[125] (2) in warranty, clearly if he is a member of or a guest in the purchaser's household and receives personal injury,[126] and perhaps in all other cases,[127] and (3) in strict liability in tort probably not at all.[128]

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[116] PROSSER § 103. *See* text *infra.*

[117] MISS. CODE ANN. § 41A:2-314 (Spec. Supp. 1967).

[118] J. C. Penney Co. v. Morris, 173 Miss. 710, 163 So. 124 (1935).

[119] Sam Shainberg Co. v. Barlow, 258 So. 2d 242 (Miss. 1972).

[120] E. I. DuPont deNemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954). Because of the strong dicta in *State Stove* and subsequent action of the court, it is assumed in notes in this section that the privity requirement in negligence has been abrogated. *See* note 42 *supra.*

[121] If the privity requirement in warranty was waived by *State Stove. See* note 108 *supra.*

[122] Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939).

[123] State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).

[124] Sam Shainberg Co. v. Barlow, 258 So. 2d 242 (Miss. 1972). *See* text *infra.*

[125] Creel v. General Motors Corp., 233 So. 2d 105 (Miss. 1970).

[126] MISS. CODE ANN. § 41A: 2-318 (Spec. Supp. 1967).

[127] *See* note 120 *supra.*

[128] Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968). *But see* Falstaff Brewing Co. v. Williams, 234 So. 2d 620 (Miss. 1970).

The *user* or *consumer* may recover from the *manufacturer* non-retailer (1) in negligence, by showing some negligent act by the manufacturer;[129] (2) in warranty, perhaps in all cases[130] and perhaps only if the product is one designed for intimate bodily use;[131] (3) in strict liability in tort, only if the requirements of the *Restatement* are met and the product was being used by the purchaser or some other consumer in a foreseeable manner,[132] or perhaps only by a showing of negligence.[133] If the injured party is a mere *bystander* he may recover against the *retailer* (1) in negligence only if he can show some fault beyond the mere sale;[134] (2) in warranty, perhaps in all cases[135] and, if not, then certainly if he is a member of the family or household or a guest in the household of the purchaser,[136] but, if he fails to meet that classification, then probably not at all, even though the product is one designed for intimate bodily use;[137] and (3) in strict liability in tort, not at all.[138] Against the *manufacturer* non-retailer, the *bystander* may recover (1) in negligence if he can show some negligent act;[139] (2) in warranty, perhaps in all cases[140] but perhaps not at all if the privity requirement has not been abrogated, regardless of the nature of the product,[141] and (3) in strict liability in tort, the anwer is uncertain.[142]

A classic example of how the choice of one of the three overlapping "theories" might affect the outcome is the supreme court's most recent products liability decision, the *Shainberg* case. There the injured party purchased a pair of shoes from the retailer and allegedly was injured in a fall caused by a quality or condition of the heel of the shoe. Plaintiff sought recovery against the apparently non-negligent retailer on the theory of strict liability in tort, and the court rejected the claim, confirming the suspicions raised by *State Stove,*[143] *Ford Motor Co. v. Cockrell*[144] and *Creel v. General Motors Corp.,*[145] that this newest theory did not apply to a retailer who did not make the product. Had the court looked to the theory of warranty, however, it should have allowed recovery by a finding that the product was not "fit for the ordinary purposes for which . . . [the shoes were] used. . . ."[146]

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[129] Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[130] *See* note 121 *supra.*

[131] Coca-Cola Bottling Co. v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[132] Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969).

[133] *See* text *infra.*

[134] Triplett v. American Creosote Works, Inc., 251 Miss. 727, 171 So. 2d 342 (1965) strongly supports this though suit was brought against the manufacturer. *See* Prosser § 100.

[135] *See* note 121 *supra.*

[136] To recover under MISS. CODE ANN. § 41A:2-318 (Spec. Supp. 1967), it must be shown that "it was *reasonable* to expect that such person may . . . be affected by the goods . . . ." [emphasis added].

[137] Coca-Cola Bottling Co. v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[138] Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968).

[139] Triplett v. American Creosote Works, Inc., 251 Miss. 727, 171 So. 2d 342 (1965).

[140] *See* note 121 *supra.*

[141] *See* note 97 *supra.*

[142] *See* note 89 *supra.*

As we shall see, imposition of liability upon the maker or seller for damages caused by a quality or condition of his product represents a policy decision, and it may be difficult to quarrel with the determinations of the policymaker, be he judge or legislator. But the law should not tolerate a situation in which, as is now frequently the case, the policy decision is subverted to the sanctity of technical rules of antiquated theories, or made to hinge upon the niceties of rules of pleading, or relegated to the vagaries of jury decisions on a case-by-case basis.[147] To understand the extent to which these situations currently exist, we must look to the crux of a products liability case and to an analysis of some of the leading Mississippi products liability cases.

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[143] At 189 So. 2d 118 the court stated:

> We adopt [Restatement (second) § 402A] *insofar as it applies to a manufacturer of a product and to a contractor who builds and sells a house with the product in it.* [emphasis added].

[144] 211 So. 2d 833 (Miss. 1968). *See* text *infra.*

[145] 233 So. 2d 105 (Miss. 1970).

[146] MISS. CODE ANN. § 41A:2-314 (Spec. Supp. 1967). That the court in *Shainberg* could have granted recovery in strict liability in warranty is demonstrated in Garner v. S. & S. Livestock Dealers, Inc., 248 So. 2d 783 (Miss. 1971) and *State Stove.* In *Garner* the trial court submitted the case to the jury under an implied warranty of fitness, § 41A:2-315, when the proper grounds were, as in *Shainberg,* a § 41A:2-314 implied warranty of merchantability. The court held "the case was submitted to the jury on the wrong theory" and reversed and remanded for a new trial under § 41A: 2-314, though the court stated it would have merely entered a judgment for the plaintiff were it not "for the confusion as to which section or sections . . . the plaintiff was invoking. . . ." 248 So. 2d at 786. The court based its authority on MISS. CODE ANN. § 1464 (1956) which provides in part that if the declaration "contains sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different." 248 So. 2d 786. In *Shainberg* suit was brought in chancery court as it was in *State Stove* and it is assumed in *Shainberg* that there was a prayer for general relief in the bill of complaint. If so, there are even stronger grounds for the court granting the plaintiff in *Shainberg* relief under § 41A:2-314, for in *State Stove* at 189 So. 2d 123 the court stated:

> The specific negligence alleged in the bill . . . does not preclude us from determining whether [defendants] are liable for negligence and strictly liable in tort, under the prayer in the bill for general relief, complainants may have any other relief than that specifically prayed if it is within the scope of the facts of the bill, not inconsistent with its purpose and cannot be said to surprise defendant. Griffith Miss. Chancery Practice §§ 186, 187 (1950).

[147] *See* text *infra. See* note 149 *infra.*

THE CRUX OF PRODUCTS LIABILITY

Despite the differing approaches of the three "theories" of products liability, there is a pragmatic identity of the basic questions presented in any case brought under any of these theories. At the heart of a products liability case, whether it is based upon negligence, strict liability in warranty or strict liability in tort, are two decisions, one of policy, the other of fact. The decisions which must be made are: (1) assuming some quality or condition of a product contributed to the happening of an accident, will the law impose liability upon the maker or other seller of the product, and, if so, what damages shall such liability encompass?[148]

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[148] Not only is the policy decision the same, but the basic tests reflecting how the decision should be made are pragmatically identical in each case. Included in the test for imposition of liability in negligence is whether the product may reasonably be expected to be capable of inflicting substantial harm if it is defective. *See* PROSSER § 96 at 643. The prevailing test for strict liability in tort includes a determination whether the product meets "the reasonable expectations of the ordinary consumer as to its safety." *Id.,* § 99 at 659. In warranty, liability results only for injuries caused by a product which is not reasonably fit for its contemplated use. *See* note 175 *infra*. The analogy here is to the implied warranty of merchantability. *See* text, *supra*. The policy decision involved in each case—assuming some quality or condition of a product contributes to the happening of an accident, should the law impose upon the maker or seller, or both, liability for certain damages resulting from such accident—encompasses factors which traditionally are treated in the tort concepts of "duty" and "proximate cause". Translated to terms of strict liability in tort, it includes whether this product was "defective" and "unreasonably dangerous" and whether this injury was an "unforeseeable consequence" or whether the conduct of another actor was the "efficient intervening cause" of the accident. If we assume that questions of policy should always be decided by the legislature or, if it defaults, by the judge, then none of these determinations should be left to the jury, even in those instances in which reasonable minds could differ. While submission of these questions to the jury has become so engrained in our traditional tort procedures that change seems unlikely, it is suggested that in developing the modern concept of strict products liability, both in tort and in warranty, such a question should never be given to the jury. This is so because in products liability, as distinguished from other accident law, society is trying to determine the extent to which it will demand safer products, taking into consideration the economic and social effects of unsafe products and of the result of imposition upon the maker or seller of the cost of injuries produced by those products. The delicate balance between these factors, and hence the overall scheme of imposition of liability, may be defeated by decisions of juries on a case by case basis. Even if we continue to submit questions of "proximate cause" to the jury, it would seem advisable in all events not to permit the jury to determine whether the product was "defective" and "unreasonably dangerous". Asking a jury under strict liability to determine whether a product was defective and unreasonably dangerous is difficult to distinguish from asking a jury to determine whether the

and (2) assuming the answer to the first question is in the affirmative, then did some quality or condition of the product cause the accident, and, if so, what is the amount of the damages?[149] The first question is clearly one of policy, and the second question is one of fact in which the answer may be dictated at least in part by policy. Let us examine in some detail the policy questions that are presented.

Policy in Products Liability Cases

The major policy question which must be resolved—and should be resolved as a matter of law—in every products liability case is simply

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maker of the product acted as a reasonable man in placing it upon the market, and we are perhaps obliterating any distinction between strict liability and negligence by submitting this question to the jury. For an earlier suggestion that in strict liability in tort, as opposed to negligence, the judge, and not the jury, should make both decisions, i.e., (1) that as a matter of policy liability may extend to this kind of activity, and (2) that liability should extend to *this particular activity of this particular defendant,* by analogy *see* RESTATEMENT (SECOND) OF TORTS § 520, comment 1 (Tent. Draft No. 10, 1964). The Mississippi court has failed to adopt these arguments and treats the question of whether a product was "defective" and "unreasonably dangerous" as one for the jury. In *State Stove,* the court wrote:

> [W]hether a product is reasonably safe or not is a flexible standard responsive to the facts of each case . . . . It is a question of fact whether the particular article involved was reasonably safe when it left the control of the manufacturer. 189 So. 2d at 121.

In *Coleman v. Ford Motor Co.*, the court wrote:

> In our opinion under the proof in this case it was for the jury to say whether or not the . . . [part which allegedly caused the accident] was reasonably safe when it left . . . [the manufacturer's] control. What is reasonable is usually a question for the jury. 240 So. 2d 607, 610 (Miss. 1970).

[149] The elements of proof in a products liability case are usually classed as these:

a) did the product leave the manufacturer or seller's hands in a "defective" condition?

b) was the injury complained of caused by the product?

c) was the product defective, i.e., unreasonably unsafe?

See 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 28.12-. 14 (1956). *See also* PROSSER § 103 at 671-72. The first of these, which we discuss in this article as "condition", is a unique question of fact in each case. The second, which we call cause, involves both mixed questions of fact and policy, i.e., causation in fact and proximate cause, and is usually submitted to the jury. The third element—was the product defective and unreasonably unsafe?—is purely a question of policy, yet under prevailing practice it usually is submitted to the jury for determination, i.e., where reasonable minds could differ as to whether the product was defective or unreasonably unsafe. It is suggested that in products liability suits the matters of policy should be decided solely by the judge, and that hence the only fact questions remaining for the jury are whether the offending quality or condition existed when the product left the manufacturer's hands, whether it was the proximate cause (which we term in this article, cause) of the accident, and, assuming these are found to exist, then the amount of damages. *See* note 148 *supra.*

this: considering the policies we seek to implement and the competing interests which will be affected by our decision, should we impose upon the seller—whether he is the maker or not—the initial burden of the costs of this injury?[150] This policy determination must be made in every case and it should be made by the legislature,[151] or, where the legislative branch has failed to act, by the judge.[152] In resolving the question the policy-maker should consider the effect which the decision to impose liability or not will have upon human conduct and upon the people who will be touched by the import of the decision.[153] The traditional tort and warranty concepts of "duty", "privity", "warranty", "efficient intervening cause", and the like add nothing to the search for a conclusion, and, after the decision has been reached, the court's pronouncements that the product was "unreasonably dangerous" or that "the manufacturer is not an insurer against all accidents" add little to society's understanding of what has been decided.[154]

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[150] In most instances, the burden of the costs of an accident will not rest upon the initial party—plaintiff or defendant—upon whom it is cast. The defendant may distribute the burden among a larger class of people through insurance or some other method of spreading the costs; similarly, the injured but unsuccessful plaintiff may spread his costs among others through accident insurance. Where the loss is left upon the losing individual—plaintiff or defendant—and he is unable to spread the loss and unable to absorb it through his own resources, then society as a whole, through welfare programs for indigents and the like, absorbs the loss.

[151] Satisfactory action by the legislature in this area is extremely unlikely. The large number of products and the situations in which they may cause or contribute to accidents makes it unlikely that the legislature could adopt a statute which would adequately define all rights and liabilities. Even if this were possible, history dictates that the legislature is unlikely to act in this area, i.e., the judicial development of products liability in the face of continued legislative passivism, and if the legislature were to act, the result is more likely to restrict rather than expand recovery.

[152] At the outset of every such decision, the decision maker must determine whether promotion of safety or compensation should be accommodated, i.e., a balance struck. Lurking in the background of such a decision is a realization of the economy of the decision-maker's sovereign, i.e., in Mississippi, a basically agricultural state, limited products liability might result in a subsidization of out of state industries by the state and its citizens, while broad recovery for products liability might make some desirable products unavailable within the state and may hamper industrial growth within the state. Another factor is the matter of reciprocity and comity with other states and their citizens. That the courts are aware of balancing of policy factors is indicated by this language from *Ward v. Hobart Manufacturing Co:*

> The interest in preventing personal injuries must be balanced against the need for viable enterprises. A decision for (plaintiff) in the present case would be a step toward the imposition of absolute liability upon manufacturers. 450 F.2d at 1189.

[153] Much has been written about the ineffectiveness of the concept of enterprise liability, i.e., spreading the costs of accidents caused by a product among those who benefit from its existence and use by imposition of liability upon the manufacturer of the product. The main criticism appears to be that enterprise liability envisions a market with "perfect competition", and that any fluctuations, such as monopoly or oligopoly, may make enterprise liability ineffective as a method of spreading the risk. *See* Calabresi, *Some Thoughts On Risk Distribution and the Law Of Torts,* 70 YALE L.J. 499 (1961). However, adoption of strict products liability in 49 states and the Dist. of Columbia, 1 CCH PROD. LIAB. REP. ¶ 4060, indicates that the prevailing

While the breadth and depth of the interests which should be balanced in deciding whether to impose liability upon the maker or seller for injuries resulting from the use of a particular product in a given situation are beyond the scope of this paper, we may establish some basic guidelines simply by analyzing the accepted goals of the law in imposition of such liability. If we eliminate any goal of satisfying the community's sense of justice through punishment of a "wrongdoer"—an elimination made necessary by prevailing social policy, reflected, among other ways, by the successful onslaught of "no-fault" insurance[155]—we are left with only three possible goals: (1) eliminating products which cause accidents; (2) reducing the number and severity of accidents caused by products, and (3) spreading the costs of such accidents among those who benefit from the existence of the product.[156]

The first of these goals—elimination of the product—may be achieved in either of two ways: by imposition of a criminal penalty, or by imposing upon those who make or sell the product absolute liability

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societal view is that the current version of enterprise liability on the whole produces a satisfactory spreading of the costs among users or beneficiaries of products, and hence we accept that premise generally and omit any discussion of the economic criticisms of enterprise liability.

[154] For example, the manufacturer is not an insurer against all accidents simply because society, through its decision makers, has not seen fit to make him such. In one limited area—accidents to his employees—the manufacturer has been made an insurer, both by state and federal statutes, i.e., workmen's compensation. In another area, the owner of an instrumentality has been made the insurer of almost all accidents caused on or by the instrumentality through judicial decision, i.e., unseaworthiness.

[155] Forms of "no-fault" insurance plans have been adopted in Massachusetts, Illinois, Florida, Minnesota, Delaware and Oregon, JOURNAL OF AMERICAN INS., 12-13 (Sept.-Oct. 1971), and similar plans are under legislative study in many other states. In addition, there have been proposals in Congress to impose nationwide "no-fault" insurance through the federal commerce power. The change in society's attitude from one which dictated that losses should be distributed according to fault to one which dictates that losses should be spread among those who benefit from the activity which produces the losses is also reflected in workmen's compensation programs in effect in all states.

[156] The goals of a system of laws regulating the award of damages for accidents are standard; the variations among the writers appear to be matters of semantics. *See, e.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 11.5 at 742-43 (1956); PROSSER § 4, at 16-23.

without fault for the injuries caused by the product. The latter method will not eliminate the product from the market, however, unless and until the imposition of liability without fault forces the price of the product to such a level that people will no longer buy it, or forces such alterations in the product that it loses its original utility.[157] Thus if the goal is to eliminate the product from the market, it can best be achieved through the criminal law and should not dictate the outcome of products liability cases.

The decision-maker's choice between the two remaining goals—encouraging the making of products which cause fewer injuries, i.e., safer products, and forcing those who benefit from the product to share the costs of the injuries it produces—should dictate the persons who may recover and those who must pay and the conduct which will give rise to liability. If we seek only to encourage the making of a safer product, liability should be based upon such factors as foreseeability of the harm and availability of alternatives, which are reflected in the concept of negligence. If we seek only to force a sharing of the costs, then liability should be based upon the act of making or selling, or both, and foreseeability of the harm and availability of alternatives become irrelevant; this is absolute liability.[158] If we seek to accommodate both goals—making safer products and spreading the costs of those accidents which do occur—then we may choose a hybrid theory which will impose liability only if the seller can pass on the costs and only if he can foresee the harm which his product does produce. If the injury can be foreseen, then he may guard against it and produce a safer product, but if he fails to foresee or to avoid the harm, then we will hold him liable—and thus spread the costs—even though he may otherwise have acted as a reasonable man. This latter accomodation of the goals is encompassed in the current accepted theory of strict products liability in tort.[159] Accomodation of both of these goals through strict products liability in tort may be desirable in many cases, but in many cases it may prevent the achievement of *any* goal of products liability law, and its foreseeability provision may be interpreted so broadly as to imply absolute liability or so narrowly that there can be no recovery for strict liability unless there is negligence.[160] Let us examine the applicability and achievement of these goals in the light of some of the situations which arise in products liability litigation.

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[157] For example, a determination by the policy-maker that the automobile manufacturer must pay damages caused by the so-called "second accident", i.e., the passenger striking the dashboard after impact, would force the manufacturer to make one of these choices: (a) absorb the amount of the claims he must pay from the profits of his enterprise; (b) place padded dashboards on all of his vehicles; or (c) raise the price of vehicles without padded dashboards to reflect the added "cost", i.e. the claims he is paying for this kind of injury. Assuming his unwillingness or inability to make the first choice, which depends in part upon the economic structure of the industry, the second and third choices eventually may result in an increase to the customer of the price of the vehicle to such a point that it will no longer be an inexpensive automobile. Thus while the particular make or model may remain on the market, a unique product, i.e., a low-cost vehicle, will have been removed from commerce.

[158] *See* note 25 *supra.*

Nature of the Condition

A product is either made as planned, and hence the offending i.e., injury-producing, quality or condition is one of design, or the product is not made as planned, in which event the offending quality or condition is one of manufacture. Where the product is made as planned, one must determine whether the offending quality or condition can be eliminated without destroying the utility of the product. If it can not, then encouraging the making of this product in a manner which will produce fewer injuries is impossible—it is "unavoidably unsafe"—and we are left with a decision to either eliminate the product or to leave it on the market and either (1) spread the costs of the injuries it produces among those who benefit from the product, or (2) let each injured person—or perhaps society as a whole—bear the loss. Given the value of the product to society despite the injuries it produces, we may determine not to drive it from the market, in which event we are left with only two choices—forcing those who benefit from the product's use to share the costs of the accidents it produces, or letting the costs be borne by the injured party and his family. If the first alternative—sharing the costs—is chosen, liability then should be imposed upon the manufacturer or retailer, or both, and at that point the fact that the "defect" is "open and obvious" becomes irrelevant rather than, as we are led to believe by many courts, controlling.[161] Thus it may not be absurd, as the Mississippi Supreme Court has implied,[162] to hold the seller of an axe liable for the injuries caused by its sharp blade, if we determine that such injuries cannot be eliminated and that it is best to spread the cost of these injuries among those who benefit from the existence and use of the axe.

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[159] *Id.* There is considerable doubt whether the current version of strict liability in tort offers any accommodation of these goals not provided by a combination of the theory of negligence and the application of the doctrine of *res ipsa loquitur* to that theory. Under 402A there must be a showing that the product left the seller's hands in an unreasonably dangerous condition and the plaintiff must have been injured as a result of contemplated use of the product. This differs from the requisite showing of negligence only in that in negligence the plaintiff must also prove that there was a breach of duty and that the conduct was unreasonable under the circumstances. *Res ipsa* furnishes the breach, *see* text *supra,* and thus the only distinction is that in negligence the judge or jury must determine whether the defendant acted as a reasonable man in placing the product upon the market, and in 402A liability they must determine whether the product which was placed on the market was unreasonably dangerous. Drawing such a distinction is difficult for a judge and impossible for a jury. *See* note 148 *supra.*

[160] Neither goal may be achieved when the product will lose its utility if the injury-producing feature is eliminated. *See* text *supra.* The nebulousness of "foreseeability," the last stopping point on the route from fault to absolute liability without fault, is well-documented in almost every jurisdiction. Compare the Mississippi Supreme Court's decision in *Pridgett, see supra* text, with that of the Fourth Circuit in Gardner v. Q. H. S., Inc., 448 F.2d 238 (1971). In *Gardner* the manufacturer sold hair curlers filled with parafin; the curlers required heating to work effectively. A consumer placed the curlers in a pan of water and fell asleep while waiting for it to boil. The water boiled out of the pan and the vapors from the parafin ignited, setting fire to the apartment building in which the consumer lived. The owner of the apartment building sued the manufacturer in both negligence and strict liability. After the lower court directed a verdict against plaintiff, the Fourth Circuit reversed, holding that the accident was "foreseeable," and hence the plaintiff was entitled to reach the jury on both theories of liability.

Where the offending quality or condition results from manufacture and not design, then the manufacturer is always in a position to make a safer product and, if he fails to do so, he is in a position to spread the costs of his unsafe product among those who use it. He may be held in the hybrid negligence-absolute liability theory represented by Section 402A of the *Restatement*, and in many cases he also would be negligent in his manufacture of the product or in failing to discover, inspect, test or warn the user that the product was not made as planned.

Status of the Defendant

At the design level as well as the manufacture level, the decision-maker who elects to impose liability upon those engaged in the process of making and distributing a product must keep his choice of the goals of products liability in mind in determining which of the parties in that process should be made to pay. Among the parties in the process there are only two categories, called for simplicity, the manufacturer and the retailer.[163] When the decision maker has elected, as discussed above, to achieve the goal of encouraging the making of a safer product, the manufacturer is a proper defendant, but the retailer usually is not unless he has participated in the process of making or testing the product.[164] When the decision is to spread the cost of unsafe products, the maker usually is always in a position to spread the costs but the retailer is not in such a position unless he can effectively pass the cost on to the maker. If the goal is to spread the costs and encourage the making of a safer product, imposition of liability upon the retailer is of questionable merit. The retailer may be incapable of placing any pressure for a safer product upon the maker greater than that which recovery by the consumer against the maker would produce, and he is not needed to spread the losses if liability may be imposed directly in a suit between the consumer and the manufacturer.[165] Even if we do not permit a direct action against the manufacturer, the retailer may not be in a realistic position to pass the cost on to anyone other than his immediate customers. In determining whether he is in such a position, one must consider the peculiar rules of indemnity and warranty which might defeat recovery by the retailer against the manufacturer, and the difficulty in obtaining jurisdiction, and the possibility that jurisdiction may be obtained only in a distant court, any of which might effectively reduce the ability of the retailer to recoup much of the damages he must pay or the costs he must incur in defending or settling the claim by the injured consumer.[166]

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[161] This would necessarily imply an elimination of assumption of risk as a defense. One worrisome problem—and perhaps the major reason why few decision makers would accept this choice—is whether permitting such recovery would discourage an individual from taking any reasonable precautions for his own safety. One might conclude, however, that the fear of personal injury or death might nevertheless make individuals continue to act reasonably, and that those few who may intentionally inflict injury upon themselves for the purposes of obtaining recovery might be sufficiently deterred by an imposition of criminal punishment, or by continued application of assumption of risk in that limited area.

[162] Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962). *See also State Stove* 189 So. 2d at 121.

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[163] The functions of the retailer and the distributor or "wholesaler" in the distributive process may differ, i.e., where the retailer is expected to perform some final act in the manufacturing process, but generally their roles are the same. Hence they normally should be treated in the same manner in the decision to impose absolute liability or strict liability. The only situations in which it would be rational to impose liability upon one and not the other, other than for negligence, would be in those rare instances in which one would enjoy a particular advantage over the other in spreading the costs or in encouraging the manufacturer to make a safer product.

[164] If the retailer is held liable to the consumer, but the manufacturer is insulated from such liability by the rules of one of the theories of products liability, i.e., in warranty where privity is not waived, the retailer may be able to recover from the manufacturer in indemnity. To this extent imposition of liability upon the retailer permits him to put needed pressure upon the manufacturer to make a safer product, but the cost of additional litigation makes it an unfeasible method of approach, and such pressure may be applied directly by permitting recovery by the consumer against the manufacturer, particularly with our modern concept of "long-arm" jurisdiction. Thus we are left with the question of whether the retailer is in a position to place economic, as contrasted with legal, pressure upon the manufacturer, i.e., if the retailer must defend suits and initially, and sometimes finally, bear the costs of an unsafe product, he will distribute the goods of some other manufacturer whose product is safer. Unless other brands are available, the number of accidents caused by one "brand" is large in comparison to those caused by other brands, and the retailer has knowledge of the comparative safety, such pressure is unlikely to occur.

[165] *See* note 164 *supra.*

Where the retailer is a merchant of used products, however, the conclusion might be different. The original manufacturer may be powerless to produce a product which will be free of an injury-producing quality or condition beyond a certain period of use, and he would be unable to spread the costs of the injuries arising from used products unless he co-mingled these costs with the costs of injuries caused by new products. In such a case, we may look only to the retailer of used products to achieve either of our acknowledged goals—placing on the market a safer product and spreading the costs of unsafe products. As he is the only person who can spread the costs and the person in the best position to promote the safety of the product, it may be desirable to impose liability upon the retailer of used products, clearly for his negligence and perhaps even without regard to any fault, depending upon the goal we seek to achieve.

Similarly, the seller who is not a merchant is in a poor position to encourage product safety or to pass the costs on to the manufacturer or to other users of the product, and imposition of liability upon him merely as a link in the distributive chain probably would not achieve any valid goal of the law.

Status of the Plaintiff

The distinction between a purchaser, a user, a consumer, a household guest and a bystander produces no meaningful difference in the achievement of the valid goals of products liability laws. Whether you seek to drive a product off the market or encourage its maker to make it safer, or simply spread the cost of the injuries produced by the quality of condition of the product, there is no valid reason for distinguishing between the ultimate purchaser and any other injured party. This is true in all events if the goal is simply to spread the losses, and it usually is true if the goal is to encourage the making of safer products.[167]

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[166] *See* Prosser § 97 at 651.

[167] Proof still would be required that the product caused the injury. The only remaining distinction would be that the seller or maker upon whom liability is sought to be imposed might be able to foresee harm to the user but not to a bystander, but such a situation would be rare.

Nature of the Product

There may be no valid reason for limiting products liability to chattels; a house is a "product" whose quality or condition can and does cause a large number of injuries. Growth of this area of products liability law, however, has been slow, probably because recovery by an injured guest or visitor and sometimes even a trespasser is provided by other areas of the law[168] and is usually the subject of protective insurance. Some courts have imposed liability upon the builder or seller—either through negligence or in strict liability—for personal injuries resulting from a quality or condition of a building,[169] and in Mississippi, the *State Stove* case may be the authority for imposition of such liability.[170]

One valid distinction among chattels is that between "unavoidably unsafe" products, products which foreseeably may produce substantial harm, and products which may be said to be "safe" or not foreseeably dangerous. There may be no product in the final category, however, because any product may cause harm by its use in some manner. The continuing vitality of the distinction between unavoidably unsafe products and others represents, as we have seen, a choice between spreading the costs among those who benefit from the existence of the product and letting these costs fall upon the injured party or society.[171] A second valid distinction is that between the seller of a used product and the seller of a new one; this is discussed *supra*.[172]

Manner of Use

The fourth level of inquiry is the manner in which the product is being used at the time of the accident, which is translated in terms of the theories of products liability as whether the product was "fit for the ordinary purposes for which such goods are used," or whether the product was "unsafe for its intended use."[173] Here one may observe that if the rationale for imposing liability is to spread the costs among the users of the product, then the manner of use—at least where the conduct of the actor does not amount to an intentional tort—should be irrelevant, but if the goal is to prod the manufacturer into making safer products, then the extent to which he can foresee a particular use and guard against injury from such use become relevant.[174]

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[168] *See* note 7 *supra*. *See also* Prosser §§ 57-61 at 351-98.

[169] *See* note 5 *supra*.

[170] In *State Stove,* defendants "Yates and Gary were more than retailers and wholesalers. They not only sold the water heater to (plaintiffs), but they constructed the house for them and installed the heater in it. . . . These contractors were engaged in the business of selling and installing such a product in homes constructed by them, and they expected it to reach the user or consumer in that condition. So, they are also strictly liable in tort. . . ."

[171] *See* text *supra*.

[172] *See* text *supra*.

[173] *See, e.g.,* Miss. Code Ann. § 41A:2-314(2) (c) (Spec. Supp. 1967) and Ford Motor Co. v. Dees, 223 So. 2d 638, 641 (Miss. 1969).

A suit for injuries which occur in a manner which the manufacturer could be expected to foresee presents no problem, for both goals may be accomodated through a hybrid theory such as that encompassed in strict products liability in tort or warranty.[175] But if the decision maker is faced with a suit for injuries which occur in a manner which the manufacturer could not reasonably be expected to have foreseen, then, whether the offending quality is one of design or manufacture, imposition of liability may achieve only one goal—sharing the costs. Apparently no court or legislature has been willing to impose liability when that goal is the only one which can be achieved, and hence we refuse to impose liability where the product was not being used in a "foreseeable" or "intended" manner, or where there was an unforeseeable "misuse" of the product.[176] The result in such cases is to leave the costs of an injury caused by a product to be borne by the injured party, or, in many cases, by society as a whole.[177]

Conduct of Intervening Actors

The manner in which any conduct of intervening actors affects the propriety of imposition of liability upon the maker or seller depends upon the nature of such conduct. If such conduct—and not some quality or condition of the product—is the actual cause of the injury, then, of course, imposition of liability upon the maker or seller would achieve neither of the accepted goals. Where the conduct of the intervening actor brings about the offending quality or condition of the product, the choices become more difficult. If the goal is to spread the costs of the injuries produced by the product, then such conduct would seem irrelevant, and the law should impose liability upon the maker or seller and allow either contribution or indemnity against the offending actor. If the goal is to encourage the making of safer products, then the foreseeability of such intervening conduct should provide the key. Where such conduct is not only foreseeable but planned, i.e., the delegation by the manufacturer to the retailer or installer of some final stage in the manufacturing process, then the manufacturer has some capabiliity for protecting against the accident and is in the best position to spread the costs, and hence liability should be imposed upon the manufacturer in any event.[178] A similar situation arises when the manufacturer or

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[174] Another valid goal of imposition of liability may be the encouragement of safe use of the product. This factor may be considered in determining whether the accident was in fact caused by the quality or condition of the product, or by the use of it, i.e., through assumption of risk or contributory negligence, and should not influence imposition of liability upon the maker or seller where it is determined that the quality or condition did in fact cause the accident.

[175] For recovery under § 402A strict liability in tort in Mississippi, in addition to proving the product was "not reasonably safe," it also must be shown that *"the plaintiff* [*was*] *injured as a result of a contemplated use of* [*the product*]." *State Stove* 189 So. 2d at 212. (emphasis added). For recovery under strict liability in warranty under the UCC, the idea of liability only for contemplated use is either expressly provided for or implied in §§ 41A:2-313 through 2-318, and for recovery under common law warranty, liability also results only for contemplated use. *See* Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[176] *See* Walton v. Chrysler Motor Corp., 229 So. 2d 568, 572 (Miss. 1969).

[177] *See* note 150 *supra.*

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[178] The majority in *State Stove* relieved the manufacturer of liability because the retailer failed to follow the manufacturer's instructions with respect to installation of safety devices. The late Chief Justice Ethridge, in dissent on this point, wrote at 189 So. 2d 125-126:

> Here an issue of policy arises which I think the Court must consider . . . . It is not unreasonable for the law to require a manufacturer of a product potentially dangerous, such as a hot water heater, to install on it at the factory safety devices . . . The manufacturer is bound to be aware of the varieties of plumbers who install such appliances, and of the foreseeable nature of a failure of some plumbers in the fifty states to install specified safety devices. The effect of the controlling opinion's interpretation of the manufacturer's instructions and warranty is to shift from the manufacturer, who knows the problem and the potentialities of injury, the risk of such injury, and to transfer it to an innocent consumer who has no knowledge of the instructions or of the method of installation . . . .

As between the consumer and the manufacturer, the manufacturer is in a better position to avoid the injury and, of course, is the only one of the two in a position to spread the costs among those who benefit from the product. This does not mean that the installer may not also be held liable, and, perhaps, be required to indemnify the manufacturer, depending upon their relationship. But as between the manufacturer and the consumer, the better view would appear to be to impose upon him the liability for the failure of his delegate, the installer, to complete the manufacturing process in a proper manner, at least, as the late Chief Justice suggested, in those cases where the foreseeability of harm is great. *See, e.g.,* Beasley v. United Gas Pipe Line Co., 255 So. 2d 907 (Miss. 1971) in which the gas company and the City of Pascagoula were sued for the wrongful death of plaintiff's infant child caused by a gas explosion. The plaintiffs alleged that the proximate cause of the explosion was the failure of the defendants to mal-odorize the gas; the gas company defended by contending that though it had not mal-odorized the gas, it had sold its product to the city which had "agreed to odorize the gas and to assume full responsibility . . . ." *Id.* at 908. The jury denied recovery and on appeal one ground of error raised by seller recognizes the necessity of warning and distributes the product to the retailer with the anticipation that such retailer will convey the warning to the ultimate purchaser. If the manufacturer is in a realistic position to pass the warning on to the ultimate purchaser or other consumer, then in all events he should be held liable for failing to do so, but where he is not in such a position, the only goal which can be achieved by imposing liability upon him is a spreading of the costs. The difficulties with this problem are revealed in the manner in which courts have handled the delegation by the manufacturer to others of his duty to warn of dangerous qualities or conditions in his product.[179]

Nature of the Damages

The furor over the types of damages which may be recovered in products liability suits has subsided. The major areas of controversy remaining involve the recoverability of damages for (a) economic loss, i.e., loss of profits,[180] (b) injuries caused by so-called "second accidents",[181] and (c) injuries resulting from some unique quality or condition of the injured party.[182] Where we seek to encourage the making of safer products, either alone or in conjunction with a spreading of the costs, then foreseeability of any accident usually will bring with it foreseeability of economic loss to the injured party; such is also true of "second accidents," for if the collision is foreseeable, then injury to the victim by impact with some portion of the product is also foreseeable, although the exact kind of harm may not be foreseeable.

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the plaintiffs was an instruction to the jury "that if it believed from the evidence that United was negligent in failing to odorize the gas, and if it further believed from the evidence that the city assumed the responsibility of odorizing the gas and failed to do so, then the jury should return a verdict for United". *Id.* at 911. The court affirmed by finding that the gas in fact had been odorized; speaking to the challenged instruction, the court stated that "[t]he error, *if any,* was harmless error". *Id.* (emphasis added). The court's statement that the instruction may have been error suggests that United could have been found liable despite its agreement with the foreseeable intervening actor, the city, if the jury had found the gas had not been mal-odorized. Thus it would appear that the court in some products liability cases, depending on the product's propensity for harm, may be willing to make a policy decision, in agreement with that portion of the late Chief Justice Ethridge's dissent in *State Stove* quoted above, of holding the manufacturer liable even though he has agreed with another actor for that actor to perform a function that will render the product "safe".

[179] *See* Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837 (Miss. 1971); E. I. DuPont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954). *See also* Prosser § 102 at 667-68.

[180] *See* Prosser § 101 at 665-67.

[181] *See* note 200 *infra.*

[182] *See* PROSSER § 96 at 648-49.

However, where the damage results from some allergy or other condition of the plaintiff, there may not be any foreseeable harm of any kind to any person, and the uniqueness of the quality or condition may determine whether the maker can be encouraged to make a safer product. Where the goal is solely to spread the costs, then loss of profits, aggravation of damages and the injury to a uniquely allergic person are all costs of the product, and recovery should be permitted.

From the foregoing discussion, several conclusions seem clear. Mississippi must determine which of the valid goals—the making of a safer product or the spreading of the costs of accidents—it seeks to achieve through products liability, and, where such goals may be accomodated, the extent to which both will be accomodated. Where we seek to accomodate both goals under the present approaches of strict liability in tort or warranty, then (a) the status of the plaintiff—purchaser, consumer, user or bystander—should have no bearing upon imposition of liability, and the continued devotion to such status as a determinative factor appears unsound; (b) imposition of liability upon any seller of a new product who did not participate in the manufacturing process achieves no valid goal unless it is determined that he is needed to and can pass the costs on to the maker, or unless he is guilty of some undesirable conduct beyond the mere sale; (c) where the product has been in use for some time, the maker may be liable if the offending quality or condition existed when it left his hands, but a subsequent retailer of the product in a used condition should be held liable not only for his negligence, but also under the present version of strict liability; (d) where the manufacturer knowingly places upon the market a product which is likely to produce injury, he should not be permitted to delegate to a subsequent link in the distributive chain the duty of warning the ultimate consumer unless the nature of the product is such that the manufacturer is unable to convey the warning directly to the consumer; (e) where the manufacturer delegates to a retailer or installer the duty of completing the manufacturing process, the manufacturer should nevertheless be held liable for the failure of his delegate to satisfactorily complete such process, perhaps in all cases and surely in those cases where the probability or severity of harm is great; (f) damages should be recoverable for the so-called "second accident" injury so long as some quality or condition of the product creates or significantly contributes to the risk of harm, and (g) in all cases, the foreseeability of injury should govern recovery unless the decision-maker is willing to accept the spreading of costs as a valid goal standing alone, in which event foreseeability becomes irrelevant and absolute liability should be imposed upon the maker or seller, or both.

Problems of Proof

The second basic question in any products liability case is one of proof—did the quality or condition exist when the product left the seller's hands and did it cause the injuries, and, if so, what is the amount of damages?[183] The question of proof presents a determination of fact affected in subtle ways by the judge's preceding determination of policy, as can be demonstrated by a brief discussion of the anatomy of proof.

In the trial of a jury case, if there is direct evidence from competent and credible witnesses as to each ultimate fact in issue, or if there is circumstantial evidence from such witnesses from which reasonable men might infer the existence of such ultimate facts, the trial judge should submit the case to the jury. If such proof is lacking as to any element or if the proof of such element is so strong that reasonable minds could not infer its non-existence, the trial judge must direct a verdict or grant a peremptory instruction on the point.[184]

Applying these basic principles to the fact issues in a products liability suit, the judge, if he has decided as a matter of policy that liability may be imposed, then must determine from the evidence presented whether reasonable minds could differ on these ultimate facts: (1) whether the condition or quality complained of existed and whether it existed when the product left the hands of the seller, and (2) whether such condition or quality caused the accident or injury. These questions may be labeled, for discussion purposes, condition and cause, respectively. Where there is direct evidence as to both condition and cause, and the judge determines that the witnesses are worthy of belief, the case should go to the jury. If the evidence as to either condition or cause is circumstantial, the court must determine whether reasonable minds could infer from such evidence that the offensive quality or condition of the product existed and that it existed when it left the seller's hands, or that the quality or condition caused the accident and resulting damages, or both.

In almost any products liability case which reaches the trial stage, both sides will be able to produce persons who will qualify as experts and who will testify that the quality or condition "probably caused" or did not cause the accident, and thus the causation factor is almost always one for the jury.[185] Hence judicial control over proof of cause has been all but surrendered to expert witnesses, and the judge retains some modicum of control only in (a) refusing to recognize a witness as an expert,[186] and (b) controlling the manner of examination and scope of testimony of the expert.[187]

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[183] *See* note 149 *supra.*

[184] *See, e.g.,* Wilson v. Kirkwood, 221 So. 2d 79 (Miss. 1969); McGraw v. Smith, 209 So. 2d 900 (Miss. 1968). *See also* 9 W. Wigmore, Evidence §§ 2494-96 at 293-15 (3d ed. 1940); C. McCormick, Evidence § 306, at 635-38 (1954).

Proof of the existence of the offending quality or condition and of its existence when the product left the seller's hands is rarely an appropriate one for expert testimony, and is only infrequently the subject of direct evidence. Hence the court in many cases is called upon to determine from circumstantial evidence whether reasonable minds might infer the existence or non-existence of the quality or condition at the time the product left the seller's hands. The judge exercises some measure of control over proof of condition when he evaluates the probative effect of circumstantial evidence offered to show that the condition or cause existed, and that it existed when the product left the manufacturer's hands. He loses this measure of control only where there is direct evidence of condition. Such direct evidence always exists in design cases, and this may explain the hesitancy of some courts to recognize liability in that area.[188] Where evidence of condition is wholly circumstantial, the trial judge must decide what circumstantial inferences, such as the nature of the product, the length of time it has been in use, or the absence of intervening conduct which might have produced the condition, are sufficient to send the case to the jury.[189]

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[185] The weight of expert testimony is a question of fact, *In Re* Rumley's Estate, 234 Miss. 490, 106 So. 2d 678 (1958), subject, as with other fact questions, to review by the court. *See* Gulf, M. & O. R.R. v. Hollingshead, 236 So. 2d 393 (Miss. 1970).

[186] Mississippi follows the general rule that the acceptance of a witness as an expert or skilled witness is within the discretion of the trial judge. Bynum v. Mandrel Industries, Inc., 241 So. 2d 629 (Miss. 1970); Glens Falls Ins. Co. v. Linwood Elevator Co., 241 Miss. 400, 130 So. 2d 262 (1961).

[187] The manner of examination, including the use and form of hypothetical questions, is within the discretion of the trial judge. Providence Washington Ins. Co. v. Weaver, 242 Miss. 141, 133 So. 2d 635 (1961). *But see* Mississippi Power Co. v. Harrison, 247 Miss. 400, 152 So. 2d 892 (1963). Limitations upon the scope of the testimony of an expert are usually expressed in terms of "invasion of the province of the jury". *Compare* Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969), *with* Coleman v. Ford Motor Co., 240 So. 2d 607 (Miss. 1970).

[188] An understanding of the nature of proof in products liability cases illustrates the dynamics of liability for improper design. If the court makes the policy determination that recovery can be had for design as well as manufacture, and, further under the prevailing view, that there is an issue of fact because reasonable minds could infer that the design in the case before it is defective, the court is frequently powerless to prevent submission of the cause to the jury. Proof that the condition, i.e., improper design, existed and existed when it left the manufacturer's hands is implicit in the nature of the case. Since witnesses usually can be found who can qualify as experts and who will testify that the condition probably caused the accident, cases involving latent design defects almost always reach the jury, with the result that the manufacturer pays. Hence negligent design smacks of absolute products liability, a concept which the decision makers generally have rejected. It is perhaps this

REVIEW OF THE MAJOR MISSISSIPPI CASES

We have seen that in every products liability case there are two major areas in which the court's determination of policy guides the outcome: the policy determination of permitting the jury to impose liability if it finds that the quality or condition existed when the product left the seller's hands, and the much subtler policy decision involved with proof. How these decisions dictate the result in any products liability case, regardless of the theory under which it is brought, and how these simple questions frequently become subverted to the peculiar rules of the designated theories, may be illustrated by a brief examination of some of the major Mississippi cases.

In *Coca-Cola Bottling Works v. Lyons,*[190] Mississippi's famous—and perhaps still viable[191]— "warranty running with the product" case, a woman purchased two bottles of a soft drink and handed one to her companion. The companion in drinking the soft drink swallowed broken glass which had found its way into the bottle. Earlier cases had held that the seller of food and beverages warranted against impurities in the product,[192] but when the injured companion sought recovery against the manufacturer, the bar of privity was raised. The court held that the implied warranty of fitness made by the manufacturer "ran with

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realization which has led to hesitancy of many courts to impose liability for design, or to rule that there is no factual dispute as to improper design because the maker was employing then acceptable safety standards in his design. *See* Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd* 450 F.2d 1176 (5th Cir. 1971).

[189] *See* Ralston Purina Co. v. Howell, 254 So. 2d 911 (Miss. 1971); Hatcher v. American Motors Corp., 241 So. 2d 147 (Miss. 1970); Coleman v. Ford Motor Co., 240 So. 2d 607 (Miss. 1970); Cola-Cola Bottling Co. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956). *See* note 238 *infra.*

[190] 145 Miss. 876, 111 So. 305 (1927).

[191] If the language of *State Stove* and the legislative action in adoption of the products liability provisions of the UCC are interpreted to have left undisturbed the common law regarding waiver of privity in warranty, then the *Lyons* doctrine remains applicable, and privity is a barrier to suits in warranty unless the plaintiff fits within one of the categories of 41-A:2-318 or the product is food, drugs or other products designed for intimate bodily use.

[192] Grapico Bottling Works v. Ennis, 140 Miss. 502, 106 So. 97 (1925); Rainwater v. Coca-Cola Co., 131 Miss. 315, 95 So. 444 (1923); Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

the title" and that, either by gift, or by purchase by her agent, the injured companion became "the rightful possessor and owner" of the soft drink and was thereby entitled to the warranty.[193] The policy question before the court, which was resolved by creation of an artificial "gift" or "agency" to fit it within established rules, was whether an ultimate consumer of a bottled drink containing impurities could recover from the manufacturer for injuries caused by consumption of the impurities. The determination of this policy question, then as now, should have been in the affirmative, not because there was a"gift" or "agency" but simply because society seeks to prevent this foreseeable harm or, if it cannot be prevented, it seeks to spread the losses from such harm among all of its citizens who derive benefit from the continued existence of bottled drinks. If the companion had taken the bottle from the hands of the purchaser by force or stealth, and then drank it, the result should have been the same, although there would have been no "gift" or "agency" and thus no warranty.[194] Similarly, if the purchaser had completed the "gift" to her companion, who had then dropped the bottle on her own foot, there should have been no recovery simply because the quality or condition of the product, i.e., the impurities in the bottle, had nothing to do with the injury.

State Stove further demonstrates how the determinative question of policy may be lost in the shuffle of legal footwork. The court there recognized the real basis for imposition of liability upon the manufacturer: the determination as a matter of policy that manufacturers should bear the cost of the injury resulting from their products.[195] But it went on to hold that there could be no liability in the instant case because the conduct of a third person was the "efficient intervening cause."[196] What the court's decision obscured, alluded to by the organ of the court in his dissent as "an issue of policy,"[197] was simply a determination of whether a manufacturer who sells a water heater without installing a certain safety device should be made to pay damages resulting from the lack of such a safety device. Once the court made this questionable policy determination—that liability will not be imposed upon a manufacturer who delegates to a retailer the completion of the manufacturing process—the addition of the phrase "efficient intervening cause" added nothing to the understanding of the case.

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[193] 145 Miss. at 883, 111 So. 307.

[194] That the Mississippi Supreme Court would find otherwise is demonstrated in Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925) in which the court denied recovery to one who received injuries from flies in a bottled drink purchased from a dealer who sold it in violation of a statute prohibiting sales on Sunday. The court held the purcraser could not recover for breach of an implied warranty because he did not have rightful possession.

> The implied warranty runs with the sale and passes with the title, and where the sale as in this case is made void by the statute, and where he is a participant in the sale, he cannot recover . . . . *Id.* at 510, 106 So. at 98-9.

One might argue that public policy should dictate that a thief may not prosper by his wrongful act, and hence that damages should be denied in the hypothetical situation presented. This argument overlooks two key factors: (1) society has dictated punishment through the criminal law for the wrongful act, and (2) if the victim is denied recovery, the loss in most cases will fall upon society as a whole, through welfare programs, and the punishment to the victim is in reality punishment of society as a whole for the joint wrongful acts of the victim and the maker or seller of the defective product. Under this analysis, it appears clear that where the loss may be borne by one of two guilty persons, or by society as a whole, it should be borne by one of the guilty persons. A second strong argument against denying liability to the thief or other wrongdoer is that it leads to such absurd conclusions as that reached in the Grapico case, *supra*, in which the violation of the law was the purchase of a soft drink on Sunday!

In *Walton,* the plaintiff sought damages caused by the "second accident" of a vehicle; after plaintiff's car was struck by another vehicle, the seat collapsed, enhancing plaintiff's subsequent injury. The court rejected plaintiff's claim against the auto manufacturer for the injuries caused by the "second accident" because involvement of an automobile in an accident was not an "intended normal use" of the product,[198] and because imposition of such liability would make the manufacturer an "insurer" against such injuries.[199] The policy question before the court was whether liability should be imposed upon the manufacturer when some quality or condition of the product does not cause the accident but merely aggravates the damages. To call this a "second accident" or to say, as the court did, that a collision between automobiles is not a normal use is to direct attention away from what was decided: as a matter of policy we will not impose liability for this kind of damage.[200]

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[195] 189 So. 2d at 116.

[196] *Id.* at 121.

[197] *Id.* at 125.

[198] 229 So. 2d 568, 573 (Miss. 1969).

[199] *Id.* at 572. *Accord,* General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971), Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970).

[200] Few legal decisions rest upon such shaky logic as do the so-called "second accident" cases in which Mississippi and a majority of jurisdictions refuse to impose liability upon the manufacturer for a quality or condition of the automobile which does not contribute to the initial impact with another vehicle or object but which merely aggravates the injuries sustained by the occupant of the automobile. Labeling the injured plaintiff's contact with or injury through the offending quality or condition as a "second accident" overlooks the obvious fact that with the exception of those cases in which the plaintiff is injured after being thrown clear of his automobile, or in which some object penetrates the interior of the automobile and strikes

The most serious problem in Mississippi products liability law is that perhaps the court has in practice rejected the theory of strict liability in tort which it theoretically embraced in *State Stove.* The court in *Walton* held that the requisites for imposition of strict liability included (a) a duty by the manufacturer to the injured person: (b) causation, and (c) damages.[201] Accepting this analysis, all that the Mississippi version of strict liability in tort eliminated was the requirement of the finding of a breach, but in reality breach adds nothing to the requirement; *one finds a duty in negligence cases only in relation to the act of the defendant and if it is determined that the duty exists the breach is automatically there!*

Preceeding *Walton,* in *Cockrell,* which was a suit based solely upon strict liability in tort, the court held the manufacturer liable but absolved the retailer, pointing out that

> [b]efore delivering the truck . . . [the retailer] thoroughly checked the truck in accordance with a pre-delivery check sheet furnished by . . . [the manufacturer] . . . .[202]

and that

> This concealed defect . . . was traced back to, and tied in with, the manufacture and assembly of this truck by . . . [the manufacturer]. There was testimony that if this truck had been

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plaintiff, almost all injuries in automobile accidents are caused by the "second accident", i.e., the plaintiff striking the interior of his automobile. Similarly, denying recovery because an accident is a "misuse", *Walton* 229 So. 2d 572, of the product may, depending upon which driver was negligent, hinge recovery upon someone else's misuse of some other product, or it may be saying that any time one does not act as a reasonable man with regard to a product, the product is being "misused" and there can be no recovery for the injuries it causes. The soundest theory upon which liability could be denied is that the offending quality or condition is not the legal cause of plaintiff's damages, but this should rest upon foreseeability unless as a matter of policy such damages will not be allowed. Since this kind of injury is clearly foreseeable the determination is solely a policy decision that we will not permit recovery for these kinds of damages. An example of how the "legal cause" approach obscures the issue is illustrated by the Mississippi Supreme Court's decision in Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970), where the Court wrote:

> It can not be said that had the appellant been thrown from the car and struck a tree stump off the road, that the stump was any part of the cause of the collision; so with the heater. 233 So. 2d 799.

This rationale overlooks the applicable analogy: could the party responsible for the continued existence of the tree stump at that place be held liable for all or part of the damages if he were found to have been negligent?

[201] 229 So. 2d at 573.

[202] 211 So. 2d at 837.

> *properly assembled* or *properly inspected by the manufacturer* that this defect would not have been present, or would have been discovered and remedied.[203]

If the court was applying strict liability in tort as to either the manufacturer or the retailer, these statements were unnecessary. What they indicate is that the court was holding the manufacturer liable because he was negligent and absolving the retailer because he was not. Further evidence that the court is abandoning strict liability in tort is furnished by the recent *Shainberg* case. There as we have seen, the court refused to impose strict liability upon the retailer of shoes manufactured by another. The retailer-defendant, upon receipt of the shoes, unpackaged them and placed them upon a rack for display to customers. The plaintiff purchased a pair of shoes from the rack and was injured when the heel of one of the shoes gave way while she was wearing them. Rejecting the plaintiff's claim, which, as the opinion stated, was based *solely upon strict liability in tort,* the court pointed out that liability should not be imposed because where, as in the instant case,

> the wholesaler or distributor purchases an article from a reputable and reliable manufacturer, sells it to a retailer in its original condition, and the retailer in turn sells the article—exactly as it came from the regular course of business, no duty devolves on the wholesaler or retailer to inspect and discover a latent defect.[204]

But this is the same test which was applied in negligence actions against the retailer prior to *State Stove;* if there was no negligence or wrongful act on the part of the retailer, he could not be held liable and he was not negligent in failing to discover a latent defect in an article.[205]

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[203] *Id.* at 839 (emphasis added).

[204] 258 So. 2d 242 (Miss. 1972).

[205] *See* Kroger Groc. Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918). In *Shainberg* the court wrote:

> We think that the reasoning is sound in the following statement made by Frumer and Friedman, in their work on *Products Liability* (1970), § 18.01: "*If he is a mere conduit of the product which he has purchased from a reputable manufacturer, as is so frequently the case under modern merchandising practices, in most instances he will not be liable in negligence for latent defects.* But if the retailer or dealer manufactures the product, or represents himself to be the manufacturer, then he has the status of a manufacturer and is subject to the same liability as a manufacturer." (emphasis added). Page 453.

The quoted language appears in Frumer in a section governing liability for *negligence!*

In *Shainberg* counsel for plaintiff apparently called to the attention of the court the doctrinally indistinguishable *Falstaff Brewing Corp. v. Williams* case in which the court earlier had held the distributor strictly liable in tort for the injuries caused by the product. The two cases were distinguishable, the court said, because in the *Williams* case "there was evidence that the distributor was *negligent* in handling the . . . [product]" '.[206] [emphasis added]. That the court would distinguish *Williams* from *Shainberg* on the basis of negligence, and thus impliedly revert from the strict liability of 402A to a requirement of negligence, is indeed an anomaly, inasmuch as the *Williams* case indicated that Mississippi was moving from 402A liability to absolute liability without fault.

In upholding liability against both the manufacturer and the distributor in *Williams,* Justice Robertson quoted[207] from Justice Traynor's concurring opinion in the California case of *Escola v. Coca-Cola Bottling Co. of Fresno,* which states in part:

> I concur in the judgment, but I believe the manufacturer's *negligence should no longer be singled out on the basis of a plaintiff's right to recover in cases like the present one.* In my opinion it should now be recognized that a manufacturer incurs the *absolute liability* when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . *Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.* It is evident that the manufacturer can anticipate some hazards and guard against the recurrance of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for *the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.* It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a

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[206] 258 So. 2d at 246.

[207] 234 So. 2d at 623-24.

> general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[208] [emphasis added].

The court in *Williams* then pointed out that

> From the evidence adduced, the chancellor could find that Falstaff in New Orleans loaded bottled Falstaff beer in case lots by fork lift truck into the truck of . . . (the distributor) who transported it from New Orleans to Natchez, and there sold and delivered the beer in its original cases to . . . (the site of the accident). The bottled beer remained in its original container in the storeroom until it was placed in the cooler back of the bar.
>
> From the evidence the chancellor could find that it was a bottle of Falstaff beer that exploded, that it was not frozen, and that the bottle exploded without being touched. The judgment of the Chancellor is supported by substantial evidence. We, therefore, affirm the judgment.[209]

If these were the only findings necessary to impose liability, it may be argued that the court was finding absolute liability without fault, beyond negligence and beyond the earlier concepts embodied in 402A and *State Stove.* Thus it is astonishing to hear the court, speaking through the author of *Williams,* say in *Shainberg* that the distributor was liable in *Williams* because "there was evidence that the distributor was *negligent* in handling the . . . beer."[210] This in turn forces the reader to further assume that the manufacturer must now be shown to be guilty of negligence, for it appears that both the manufacturer and distributor were held liable in *Williams* under the same theory—strict liability in tort.

The *Dees, Williams* and *Shainberg* cases can be limited by their facts and their subsequent reinterpretation by the court to mean simply that strict liability in tort will not be extended to a seller who did not make the product. Such a result adds to the confusion, however, because the seller non-manufacturer will be held strictly liable in warranty under the provisions of the UCC. But the language of these cases, read with the court's reasoning in the *Walton, Cockrell* and *Creel* cases, which involved liability upon the manufacturer, implies strongly that the Mississippi Supreme Court is applying the principle that there can be no strict liability in tort by either seller or manufacturer unless there is proof of some negligent act. If this is so, then the doctrine of *State Stove* is dead, and Mississippi products liability law has reverted to its pre-1966 status, with the exception that privity is no longer required.

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[208] 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944).

[209] 234 So. 2d at 624.

[210] 258 So. 2d at 246.

Three recent policy decisions made by the court in *Pridgett v. Jackson Iron and Metal Co.*[211] have added to the confusion surrounding Mississippi products liability law and may serve to stifle its proper growth. A tool manufacturer purchased paint for his manufacturing process in steel drums and sold the empty drums to a scrap dealer. The scrap dealer sold most of the drums and other scrap to steel mills for reprocessing, but he sold some of the drums to other businesses for use as trash receptacles. Plaintiff's employer purchased some of these drums from the scrap dealer and instructed plaintiff to cut the drums with an acetylene torch. When he attempted to do so, he failed to remove the bungs as instructed, and accumulated fumes in the drum caused an explosion, resulting in personal injury to the plaintiff. Plaintiff proceeded against the tool manufacturer and the scrap dealer under the theory of strict liability in tort. The evidence showed conclusively that the plaintiff's supervisor specifically instructed plaintiff to remove the bungs before cutting the drums, and that if he had done so the explosion would not have occurred, but that plaintiff ignored the instructions.[212] The entire matter could have been disposed of by holding that the plaintiff specificially assumed the risk, an absolute defense to the action.[213] Instead, the court did not mention assumption of risk, but exonerated the tool manufacturer by a finding that the sale of the drums by it (a) was neither a frequent nor the *chief function* of the manufacturer, and hence it was not in the business of selling drums,[214] and (b) the sale of a used product might trigger liability for negligence or breach of warranty, but not strict liability in tort,[215] and (c) the manner in which the injury occurred was not foreseeable and hence strict liability in tort did not apply anyway.[216] The court also exonerated the scrap iron dealer because (a) it was under no duty to warn the plaintiff-user of the danger because its immediate purchaser knew of the danger,[217] and (b) the plaintiff-user's disregarding of his employer's instructions was an unforeseeable and abnormal use of the product,[218] and (c) strict products liability in tort probably would not apply to the sale of a used product or, at least, to the sale of used scrap iron.[219] The decision is unfortunate not in its ultimate result, but because it may be difficult in future cases to adhere to and to apply the rules that (a) the strict liability doctrine applies only to the product whose sale is the "chief function" of the seller, and (b) strict liability in tort does not apply to the sale of a used product,[220] and (c) there is no "duty to warn" the ultimate user or consumer and that any duty to warn is satisfied by a warning given to the immediate vendee.[221]

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[211] 253 So. 2d 837 (Miss. 1971).

[212] The only evidence before the court was testimony by plaintiff's supervisor that he had so instructed plaintiff. Plaintiff's testimony that he had not received such instructions was excluded by the trial judge. 253 So. 2d at 839-40.

[213] Assumption of risk is treated as a defense to strict liability in tort in the overwhelming majority of jurisdictions. *See* PROSSER § 79 at 522-23. Conduct such as that of the plaintiff in the instant case would constitute the voluntary encountering of a known risk which Mississippi courts have deemed sufficient for application of the doctrine of assumption of risk and the inapplicability of comparative negligence. *See* Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

[214] 253 So. 2d at 840.

[215] *Id.* at 840-41.

Causation

In several cases the court has dealt with the second phase of a products liability suit—proof that the product left the seller's hands with the offending quality or condition, and that the offending quality or condition caused the injuries in question.[222]

As we have seen, the second of these two questions of fact usually may be established in a products liability suit by expert testimony.[223]

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[216] *Id.* at 841.

[217] *Id.* at 843-44.

[218] *Id.* at 844.

[219] *Id.* at 840, 844.

[220] FRUMER § 16A[4][iv] states that though § 402A does not expressly include the sale of used products within its scope, it would certainly seem to do so. It does not appear, as noted by the court at 253 So. 2d 840, that the seller of a used product has as yet been held liable under strict liability in tort. *But see* text *infra.*

[221] *See* text *supra.*

[222] Denman v. Armour Pharmaceutical Co., 322 F. Supp. 1370, 1375 (N.D. Miss. 1971); Coleman v. Ford Motor Co., 240 So. 2d 607, 610 (Miss. 1970); Creel v. General Motor Corp., 233 So. 2d 105, 109 (Miss. 1970); Walton v. Chrysler Motor Corp., 229 So. 2d 569, 573 (Miss. 1969); Coca-Cola Bottling Co. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

[223] Alman Bros. Farms & Feed Mills, Inc. v. Diamond Cab, Inc., 437 F.2d 1295, 1296 (5th Cir. 1971); Coleman v. Ford Motor Co. at 240 So. 2d 609; Ford Motor Co. v. Dees, at 223 So. 2d 641. In *Dees* the person who qualified to testify as an expert witness on defectiveness of the product when it left the manufacturer and on causation was the "part owner and manager of a large automotive repair shop" with thirty years experience. *Id. See also* Falstaff Brewing Corp. v. Williams, 234 So. 2d 620 (Miss. 1970); Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968); E. I. DuPont deNemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954).

The first fact question—that the quality or condition existed when the product left the seller-defendant's hands—presents the difficult area because generally it must be established by circumstantial evidence.[224] Direct evidence of condition may be available,[225] however, and in cases where the offending quality or condition is one of design, as in *Hobart*[226] and *Walton,* direct evidence that the quality or condition existed when the product left the seller's hands is implicit in the case.[227] Where the only proof of condition is circumstantial, the court must evaluate the probative force of the circumstantial evidence which is adduced.[228] Such a problem was before the court in the landmark *Lyons* case; there the manufacturer argued that the impurity found its way into the bottle after the bottle had left the manufacurer's hands. The court rejected this argument because the defendant had not established by the evidence that it had pursued a perfect method of bottling, but implied that if such could be shown, it might constitute a defense.[229] What the court actually was holding was that the presence of an impurity in a bottled beverage created an inference that the quality or condition existed when the product left the manufacturer's hands, and that since the defendant had not introduced evidence sufficient to rebut this inference, the question of causation was for the jury.

Williams highlights the manner in which the question of causation may become obscured by reverence for terminology. The plaintiff received injury from an exploding bottle and in his suit against the manufacturer charged negligence, alternatively relying upon *res ipsa loquitur* or strict liability in tort. The court wrote:

> In Johnson v. Coco-Cola Bottling Co. . . . this Court held that the doctrine of res ipsa loquitur applied where a bottle of Coca-Cola unexplainably exploded and injured a person. We

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[224] Coleman v. Ford Motor Co., 240 So. 2d 607, 609-10 (Miss. 1970); Falstaff Brewing Corp. v. Williams, 234 So. 2d 620, 622-24 (Miss. 1970).

[225] Ford Motor Co. v. Dees, 223 So. 2d 638, 640-41; Ford Motor Co. v. Cockrell, 211 So. 2d 833, 839.

[226] Ward v. Hobart Mfg. Co., 317 F. Supp. 841, 847-48 (S.D. Miss. 1970), *rev'd* 450 F.2d 1176 (5th Cir. 1971).

[227] In *Ward* the district court stated:

> If the plaintiff can establish negligence of design . . . he not only has established fault despite the fact that the product may be operating satisfactorily . . . after the accident, but also that the defect existed when the product left the manufacturer's plant, regardless of undue wear or mishandling thereof. 317 F. Supp. at 847.

[228] *See* Denman v. Denman, 242 Miss. 59, 67-68, 134 So. 2d 457, 459 (1961) for what is sufficient. Coleman v. Ford Motor Co., 240 So. 2d 607, 610 (Miss. 1970); Johnson v. Coca-Cola Bottling Co., 239 Miss. 759, 125 So. 2d 537 (1960).

[229] 145 Miss. at 885-86, 111 So. at 307-08.

> are inclined to feel that the rule of strict liability in tort is more applicable in exploding bottle cases.[230]

This ruling indicates a confounding of policy and proof. Strict liability decrees that as a matter of policy, without proof of wrongful act, a manufacturer of a product may be held liable for the damages caused by some quality or condition of the product.[231] Whether the liability sought to be imposed is strict or through negligence, there must be in either event a showing that the product caused the injury.[232] *Res ipsa loquitur* is a doctrine of the strength of proof which dictates, among other things, when there exists a permissible inference of causation.[233] If the theory of the case is negligence, then proof that (a) the conduct of the injured party did not contribute to the accident, and (b) the instrumentality which did in fact contribute to the accident was within the control of the alleged wrongdoer, and (c) the accident is one which ordinarily would not occur in the absence of negligence, will give rise to an inference of both breach of duty and causation.[234] Where the theory of the case is strict liability, either in warranty or in tort, there is no need to find breach of duty,[235] but the presence of two of the elements of *res ipsa*— (a) and (b) above—should give rise to a reasonable inference that some quality or condition of the product did in fact cause the accident, which, as we have seen, is an essential element of any products liability case, regardless of the theory upon which it is based. The court in *Falstaff* nevertheless permitted the case to go to the jury upon proof of (a) and (b) and thus recognized the inference of causation which *res ipsa* represents while stating that *res ipsa* had no applicability in strict liability cases.[236]

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[230] 234 So. 2d at 623.

[231] Walton v. Chrysler Motor Corp., 229 So. 2d 569 (Miss. 1969); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966).

[232] Walton v. Chrysler Motor Corp., 229 So. 2d 569, 573 (Miss. 1969).

[233] PROSSER § 39.

[234] Johnson v. Coca-Cola Bottling Co., 239 Miss. 759, 125 So. 2d 537 (1960). Since the injury-causing product is seldom within the control of the maker or seller at the time of the injury, the courts generally interpret this requirement of res ipsa in products liability cases to mean that the product was within the control of the maker or seller at the time the defect, i.e., the offending quality or condition, arose. *Id.* at 765-66, 125 So. 2d at 539. *See* Prosser § 39 at 219-21.

[235] Walton v. Chrysler Motor Corp., 229 So. 2d 569, 573 (Miss. 1969).

[236] Proof of (a) consisted of evidence that the exploding bottle was not touched by the plaintiff and was not frozen, 234 So. 2d at 624; proof of (b) from the fact that beer was bottled by Falstaff, *Id.* at 622, loaded on the distributor's trucks, transported to Natchez and sold and delivered to where plaintiff worked where it "remained in its original container in the storeroom until it was placed in the cooler back of the bar." *Id.* at 624. *Accord,* PROSSER § 103 at 672-73.

Circumstances which the Mississippi Supreme Court has deemed sufficient to establish a reasonable inference that the offending quality or condition existed when the product left the seller's hands include the nature of the product[237] and the combination of circumstances which negative the probability that the quality or condition could have been caused by some other agency or action.[238]

Other Law Affecting Products Liability Litigation

An evaluation of a system of laws should include a study of the effect of the interplay of other laws upon that system. Such a study is specially significant in products liability where recovery may be predicated upon three different "theories". Let us examine some of the other areas of law which could have a major impact upon products liability law.

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[237] Ralston Purina Co. v. Howell, 254 So. 2d 911 (Miss. 1971) (animal feed); Falstaff Brewing Corp. v. Williams, 234 So. 2d 620 (Miss. 1970) (exploding bottle); Coca-Cola Bottling Co., Inc. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956) (bottled beverages); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 2d 365 (1918). (tobacco).

[238] One factor is no substantial change in the product, as required by § 402A before there can be strict liability in tort. In Hatcher v. American Motors Corp., 241 So. 2d 147 (Miss. 1970) the court upheld the jury's finding that the installation of overload springs two or three months prior to the accident and after the plaintiff had owned the car about two years was a substantial change. Other factors are the age and history of the product and the use made thereof. Liability was denied in *Hatcher,* when the vehicle had been purchased new and had been driven almost 46,000 miles "without any apparent incident or failure prior to the accident", *Id.* at 147, and in Coleman v. Ford Motor Co., 240 So. 2d 607 (Miss. 1970), in which the truck had been purchased new, had been driven 57,000 miles and was designed and used for carrying heavy loads of gravel, and in *Creel,* in which the car was purchased new and the accident did not occur until almost thirty months and 30,000 miles later. Liability was imposed in Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969), in which the injury causing vehicle was only "six weeks old, . . . had been driven about 5,000 miles . . . had not been involved in an accident of any kind and no repairs had been made to it." *Id.,* at 640. Recovery also was permitted in *Cockrell* where the truck was just over 4 months old and had been driven just over 5,000 miles, 211 So. 2d 835. The truck in *Cockrell* had been purchased new, was purchased and used for hauling gravel and other road building materials, was used only during daylight, *Id.* at 834, and had been driven by only one driver who testified it had not been abused. *Id.* at 837. *State Stove* 189 So. 2d at 118, noted that a lapse of seven months of use before the accident indicated that there had not been a defect. Other factors are whether there have been similar accidents with the same product, *Coleman,* 240 So. 2d at 609-10, and whether the manufacturer has issued warnings and recall letters concerning the product. *Id.* at 608-10. The court also considers physical evidence, such as the wear or skid marks which give inferences of a particular defect. *Id.* at 609. In Creel v. General Motors Corp., 233 So. 2d 105 (Miss. 1970) the court at 108 ruled that a bulletin issued by the manufacturer instructing that a splash shield be installed was a factor to consider. In bottled beverage cases, such as Coca-Cola Bottling Co., Inc. v. Savage, 228 Miss. at 616-17, 89 So. 2d 636, the sequence of events—filling and capping, delivery to retailer, purchase and opening—justify finding liability.

Among areas of substantive law, three which come readily to mind are the extent to which damages are permissible for wrongful death and survival, the extent to which the victim's conduct bars his recovery, and the extent to which one party cast in judgment is permitted to recover from a third person. As to the first question, Mississippi's wrongful death statute provides in relevant part:

> Whenever the death of any person shall be caused by *any real wrongful or negligent act or omission,* or by *such unsafe machinery, way or appliances* as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or *whenever the death of any person shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption,* as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof. . . .[239] (emphasis added).

This clearly covers negligence, but as to warranty, the statute, last amended in 1958,[240] narrowly limits recovery, and fails to provide for the increased liability under the UCC.[241] The court has impliedly extended the statute to strict liability in tort cases,[242] but, as with warranty, recovery may hinge upon the type of product which caused the death.[243]

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[239] Miss. Code Ann. § 1453 (Supp. 1971).

[240] Gen. Laws of Miss. ch. 285, § 1 (1958).

[241] That the court may not extend recovery beyond the express terms of the statute is demonstrated in Logan v. Durham, 231 Miss. 232, 239, 95 So. 2d 227, 229 (1957) in which the court stated: "Since the state created an action unknown to the common law, we are not justified in extending its application beyond its terms."

[242] Coleman v. Ford Motor Co., 240 So. 2d 607 (Miss. 1970) in which recovery was sought in strict liability in tort by the heirs of one killed in a truck accident.

[243] If the statute is strictly construed, *See* note 239 *supra,* as language of the cases illustrates, then recovery for wrongful death is denied through strict liability for a product that is not machinery, a way or an appliance, e.g., food, drugs, cosmetics, herbicides, insecticides, and cigarettes. The present status of the wrongful death act in the field of products liability is such that some injured persons may be able to recover from the seller, but if death ensues, their heirs may be denied recovery. Consider, e.g., the case of a guest in the buyer's household who is injured by some product other than one intended for intimate bodily use. If he lives, he may recover under strict liability in warranty by virtue of the provisions of § 2-318, but if he dies his heirs may be denied recovery in wrongful death in warranty because of the restrictive language, and they would not be able to recover in strict liability in tort because the Court has held that Mississippi's version of 402A does not apply to retail sellers.

Mississippi is the only state to adopt "pure" comparative negligence, i.e., unless the victim's fault can be said to have been the sole cause of the injury, he may recover from the defendant that percentage, no matter how slight, of his damages which is proportionate to the percentage of fault of the defendant.[244] This policy, although it frequently is circumvented by the application of the doctrine of assumption of risk in those areas in which the defenses overlap,[245] should dictate that in a products liability suit the failure of the injured party to discover and avoid injury from a quality or condition whose injury-producing tendency is patent is not an absolute bar to recovery. The Mississippi Court, however, refuses to extend protection to an injured consumer for injuries caused by any "open" or "obvious" defect, and this refusal perhaps does violence to the legislative policy that contributory negligence does not bar recovery as a matter of law but is to be considered by the jury in assessing damages.[246]

Under Mississippi law, a defendant who is cast in judgment may not recover all or part of the judgment from a third person unless (a) the third person is joined with him as a party to the suit,[247] or (b) the third person is liable to the judgment debtor under strict rules of indemnity.[248] Thus where recovery is permitted against the retailer as sole defendant, he will be unable to pass any of the cost on to the maker unless he fits within the limited scope of indemnity. Even where he is sued jointly with the maker, and judgment is rendered against both, he may be required to pay his pro rata share of the damages regardless of his degree of culpability.[249] The result is a paradox in the only state which employs "pure" comparative negligence: the jury is allowed to apportion negligence and damages between the plaintiff and the defendant (s), but is not allowed to apportion damages between defendants.

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[244] Miss. Code Ann. § 1454 (1956). *See* Note, *Torts-Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law,* 39 Miss. L.J. 493, 494 (1968) *See also* Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285 (1938); Yazoo & Miss. Valley R.R. v. Williams, 114 Miss. 236, 74 So. 835 (1917).

[245] Miss. Code Ann. § 1455 (1956). See note 246.

[246] *See* Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964) in which the court stated in regard to contributory negligence:

> We have heretofore refused to invade the province of the legislative branch of our state government. This Court cannot and should not, by its decree, vitiate, and in fact nullify, . . . [§§ 1454, 1455] enacted by the legislature.

As to the delicate distinction between contributory negligence and assumption of risk, *see* White v. Mississippi Power and Light Co., 196 So. 2d 343 (Miss. 1967); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947). *See also* Ward v. Hobart Mfg. Co., 317 F .Supp. 841 (S.D. Miss. 1971), *rev'd,* 450 F.2d 1176 (5th Cir. 1971) for the conflicting manner in which the courts considered the "obvious defect," the district court finding that it was to be considered merely as contributory negligence, 317 F. Supp. 852-53, while the court of appeals relied on Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962) for the rule that there is no duty to warn when the defect is "obvious" and that if the defect is obvious, it bars recovery, 450 F.2d 1180, 1186-88.

[247] Third party practice is not allowed in Mississippi. *See,* Security Mut. Life Ins. Co. v. Brunson, 176 Miss. 893, 170 So. 824 (1936).

[248] *See* Home Ins. Co. of New York v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970); Blain v. Sam Finley, Inc., 226 So. 2d 742 (Miss. 1969); Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968).

Jurisdictional rules which might present problems in a Mississippi products liability suit include the ability of the injured party, or the retailer who is cast in judgment, to obtain in personam jurisdiction in a Mississippi court over the non-resident maker. While the state's comprehensive "long-arm" statute[250] apparently eliminates most of the diffi-

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[249] Miss. Code Ann. § 335.5 (1956).

[250] *Id.*, § 1437 (Supp. 1971), which reads in part:

> (a) Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this State as to doing business herein, *who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State, or who shall commit a tort in whole or in part in this State against a resident of this State,* or who shall do any business or perform any character of work or service in this State, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accuring from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee. Any such cause of action against any such said nonresident, in the event of death or inability to act for itself or himself, shall survive against the executor, administrator, receiver, trustee, or any other selected or appointed representative of such nonresident . . . [emphasis added.]

The court in Smith v. Temco, Inc., 252 So. 2d 212 (Miss. 1970), in which suit was brought for property damage caused by a defective heater, held that Temco was within the jurisdiction of state courts even though Temco was not qualified to do business in Mississippi and had not named any party to serve as agent for process in Mississippi. The court based its findng of jurisdiction on Temco committing a tort in Mississippi though the product had been manufactured outside Mississippi, ruling at 252 So. 2d 216 that a "tort is not complete until the injury occurs. . . ." The court further added:

> Under the amended statute, a nonresident manufacturer of a dangerously defective or unsafe product who places it in interstate commerce for the purpose of distribution and ultimate sale to consumers in other states, whether

culty, there remains a question as to its application for suits brought under strict liability in warranty.[251]

A second jurisdictional difficulty stems from Mississippi's system of separate courts of law and equity. Jurisdiction over a suit in tort rests with the court of law, while power to render judgments for breach of contract rests with the chancery court. While it is probable that much of the problem has been eliminated by classification of a suit for breach of warranty with resulting personal injuries as sounding in both tort and contract,[252] there is a possibility that an injured party may be required to make an irrevocable and possibly fatal choice of theories before filing suit.[253]

The major procedural hurdle in products liability suits in Mississippi is, of course, the lack of adequate discovery devices.[254] Frequently the plaintiff may be able to bring his suit in federal court against the non-resident manufacturer under diversity jurisdiction[255] and thus obtain the benefit of the broad federal discovery procedure. He loses this option if, as is often the case, he is compelled to join a resident tort-

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> with a specific intent that it be distributed, sold and used in this state or not, may be subjected to a personam action for damages in the courts of this state by such consumer who may be injured in this state as a result of its defective or unsafe condition. *Id.*

[251] As strict liability in warranty is based on both tort and contract, Prosser § 95 at 634-35, § 97 at 654, suits brought under this theory should be covered by Miss. Code Ann. § 1437 (Supp. 1971) as was done in Smith v. Temco, Inc. for strict liability in tort. *See* Prosser § 101 at 666. However, if recovery is sought under the UCC, the court may hold this remedy to be purely contractual and therefore, finding no tort as in *Temco,* must then determine whether the contract was "to be performed in whole or in part . . . in this state." Miss. Code Ann. § 1437, *supra.*

[252] Prosser § 95 at 634-35, § 97 at 654.

[253] *See* Town of Hazelhurst v. Cumberland Tel. & Tel. Co., 83 Miss. 303, 35 So. 951 (1904). *See also* Patterson & Patterson, *A Plea for Procedural Reform in Mississippi,* 42 Miss. L.J. 293, 300 (1971); Fant, *Procedural Reform in Mississippi,* 34 Miss. L.J. 40 (1962). This problem will be made more acute if it is held that recovery in strict liability in warranty under the UCC is purely contractual. Such a result has been suggested, *see* Witherspoon, *Torts or Warranties,* 39 Miss. L.J. 199 (1968), and would appear clearly correct at least in the area of express warranty or implied warranty of fitness for a particular purpose, both of which rest upon express or implied agreement between the parties.

[254] See Patterson & Patterson, supra, note 251.

[255] Absent a federal question, e.g., the National Traffic and Motor Safety Act of 1966, 15 U.S.C. § 1381 *et. seq.* (1970), federal jurisdiction probably could be obtained only under the diversity statute, 28 U.S.C. § 1332 (1970) which has been interpreted to require that none of the defendants may be citizens of the same state as the plaintiff.

feasor or the retailer or distributor of the product.[256] Thus the absence of adequate discovery in the Mississippi state court may pose a significant hurdle to the plaintiff in a products liability case which, as we have seen, is one in which proof of the condition and the cause are essential and in which evidence of them is often solely within the control of the defendant.

SUMMARY AND CONCLUSION

Recovery for damages caused by some quality or condition of a product developed in American law through judicial adaptation of the common law remedies of negligence and breach of contract. Recovery in Mississippi under either theory was barred by the persistent adherence of the supreme court to the doctrine that there could be no recovery against a party who was not in privity with the injured consumer or user of the product. This barrier of privity ordinarily prevented recovery against the manufacturer, and recovery by the injured consumer against the only party with whom he may have been in privity, the retailer, usually was blocked both in warranty and in tort by the fact that such retailer was free from fault.

Dissatisfied with the manner in which products liability law was developing, courts in other jurisdictions sought to fashion a remedy which would effectuate the recognized societal goals sought to be achieved by imposition of liability upon the manufacturer or other seller. Imposition of such liability is justified only as a means to achieve one or both of these societal goals: encouraging the making of a safer product, and spreading the costs of unsafe products among those who benefit from the existence of the product. When only the first of these goals is sought to be achieved, there should be some determination of fault on the part of the maker or other seller, but where the second of these goals is sought to be achieved, then absolute liability should be imposed without regard to fault, i.e., the alternatives available to the maker and the foreseeability of the type of accident which produces the injury. In abandoning as unsuitable in modern society the theories of negligence and warranty, most American jurisdictions have adopted a theory of strict liability in tort which seeks to encourage both the making of safer products and the spreading of the cost of unsafe products. This theory, embodied in the *Restatement of Torts Second,* imposes liability upon the maker or other seller if he is in the business of selling and if the injury-producing use of the product was foreseeable.

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[256] As has been seen, the present uncertainties and ambiguities resulting from the application of the three theories of products liability ordinarily would make a plaintiff hesitant to eliminate any party in the distributive chain over whom personal jurisdiction could be obtained.

When the Mississippi Supreme Court finally opened the door to products liability suits in 1966, it ostensibly adopted the restatement version of strict liability in tort. In its first decisions interpreting such liability, the court seemed to be moving in the direction of absolute liability without fault, but in its later decisions the court apparently has swung full cycle and may be unwilling to impose any liability upon a maker or seller of a product unless negligence can be established.

Further complications came with the adoption in Mississippi of the Uniform Commercial Code and its provisions relating to products liability. The Mississippi version waives the requirement of privity between the retailer and a limited class of persons, but is expressly noncommital on whether privity is otherwise required. This action, read with the supreme court's broad dicta abolishing the requirement of privity in any products liability case, may mean that warranty may provide recovery by an injured user of a product from any person in the manufacturing or distributive chain.

These events have produced considerable confusion in the early years of the development of Mississippi products liability law. Recovery may be had under any of the three theories—negligence, breach of warranty and strict liability in tort—but the results are varying and inconsistent. The retailer, for example, may be strictly liable in warranty but not in tort, while the manufacturer may be subjected to the same liability in tort but not in warranty. A bystander who is injured by another's use of a product may be able to recover in warranty but not in tort, but if death ensues his survivors may be able to recover only by proving negligence.

In addition to confusion, the results of Mississippi products liability cases frequently do violence to the established goals of such liability. For example, imposition of strict liability upon the retailer serves no useful purpose except a spreading of the costs, a goal which the court rejects in refusing to extend liability for unavoidably unsafe products.

Mississippi law could have been spared the confusion and irrationality which now prevades, and perhaps it is not too late to avoid the trap into which it is falling. It is hoped that some decision-maker—legislature or court—will soon take affirmative action to bring order out of this chaos before Mississippi products liability law crumbles under the weight of incongruous precedent.

STUDENT COMMENTS

SEARCH INCIDENT TO ARREST AND THE AUTOMOBILE

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*[1]

INTRODUCTION

The clear dictate of the fourth amendment is that persons shall be free from unreasonable searches and seizures. In the words of Justice White, "[t]he Amendment does not proscribe 'warrantless searches' but instead it proscribes 'unreasonable searches'. . ."[2] Despite its language, it early became apparent that the United States Supreme Court would interpret the amendment to require the issuance of a search warrant in most cases before a search could be termed "reasonable."[3] Although there has been some vacillation during the years,[4] it appears firmly established that warrantless searches are strictly limited exceptions to the warrant requirement and will be closely scrutinized by the courts.[5]

The most generally recognized exceptions to the warrant requirement are searches of movable property, such as automobiles,[6] protective searches for weapons,[7] and search incident to arrest.[8] Of the three, the courts have found the greatest difficulty in establishing the constitutional standards for a search incident to an arrest.[9] It is the purpose of this comment to attempt to enunciate the present constitutional standards as they apply to an arrest involving an automobile, with particular emphasis on arrests for traffic violations and the Mississippi rule as it contrasts with those standards. Such an undertaking requires an examination, not only of United States Supreme Court decisions relating to search incident to arrest, but also that Court's decision relating to the search of automobiles.

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[1] U.S. CONST. amend. IV; *see also* MISS. CONST. art. 3, § 23, which contains almost identical language.

[2] Chimel v. California, 395 U.S. 752, 772-73 (1969) (dissenting opinion).

[3] *See* Weeks v. United States, 232 U.S. 383 (1914).

[4] *See, e.g.,* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

[5] *See* Chimel v. California, 395 U.S. 752 (1969); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Preston v. United States, 376 U.S. 364 (1964); King v. State, 230 So. 2d 209 (Miss. 1970). *But cf.* Chambers v. Maroney, 399 U.S. 42 (1970).

[6] Carroll v. United States, 267 U.S. 132 (1925). Although such searches may be made without a warrant, probable cause for search must exist before the search is initiated.

I. SEARCH INCIDENT TO ARREST: THE EVOLUTION OF STANDARDS

A. Background of Confusion

It has long been recognized that when a person is legally arrested, he may be searched without a warrant in order to discover the fruits and instrumentalities of the crime, weapons, and means of effecting an escape.[10] The issue which has most perplexed the courts is the permissible scope of such a search—whether it extends beyond the person, and if so, how far?

The United States Supreme Court first spoke directly on the point in 1927 in *Marron v. United States*.[11] Prohibition agents, armed with a search warrant authorizing seizure of intoxicating liquors and articles for their manufacture, entered a building suspected of housing illicit liquor activities. The agents found a saloon in operation with large quantities of liquor and arrested Birdsall, the man in charge. During the search certain ledgers were seized which identified Marron as the proprietor of the establishment. At his trial, Marron moved to have the ledgers suppressed, since they were not described in the search warrant. Affirming Marron's conviction, the Court said:

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[7] Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968). The Court in *Sibron,* while holding such searches permissible, noted that before an officer searches a citizen, "he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Id.* at 64.

[8] *E.g.,* Preston v. United States, 376 U.S. 364 (1964).

[9] In Chimel v. California, 395 U.S. 752 (1969) (dissenting opinion), Justice White stated the problem thusly:

> Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest". There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis . . . [*Id.* at 770.]

[10] Preston v. United States, 376 U.S. 364 (1964); Weeks v. United States, 232 U.S. 383 (1914) (dictum); Bird v. State, 154 Miss. 493, 122 So. 539 (1929).

[11] 275 U.S. 192 (1927). Earlier decisions had indicated by way of dicta that the place where the arrest is made may also be searched for evidence of the crime, weapons, and means of escape. *E.g.,* Agnello v. United States, 269 U.S. 20 (1925).

> The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. . .While it [the ledger] was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose.[12]

The *Marron* decision was limited in 1931 by *Go-Bart Importing Co. v. United States.*[13] Officers made a lawful arrest for conspiracy to violate the Prohibition Act, and incident to that arrest, they made a general warrantless search of an office, seizing incriminating papers. Holding that the papers were seized during an unreasonable search, the Supreme Court distinguished the case from *Marron* on the basis that the *Marron* decision permitted warrantless searches of the place where an arrest is made only when an offense is committed in the officers' presence.

One year later *Go-Bart* was reinforced by *United States v. Lefkowitz.*[14] On facts almost identical to those in *Go-Bart,* the Supreme Court again held a warrantless search of an office to be unreasonable, even though made incident to an arrest:

> There is nothing in the record to support the claim that, at the time of the arrest, the offense for which the warrant issued or any other crime was being committed in the presence of the officers.[15]

In 1947 the rationale of *Go-Bart* and *Lefkowitz* was greatly damaged by *Harris v. United States.*[16] Harris was arrested in his apartment on warrants charging mail fraud and interstate transportation of forged checks. Following his arrest and while he was handcuffed, agents conducted an extensive five hour warrantless search of the entire apartment for the stated purpose of discovering two cancelled checks and instrumentalities used to commit the crimes charged. The search revealed draft cards which resulted in Harris' conviction for violation of the Selective Service Act.[17]

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[12] 275 U.S. at 198-99.

[13] 282 U.S. 344 (1931).

[14] 285 U.S. 452 (1932).

[15] *Id.* at 462-63.

[16] 331 U.S. 145 (1947).

In a five-four decision the Supreme Court affirmed Harris' conviction, resting its holding on the fact that the scope of the search was reasonable in light of the circumstances of the arrest and the object of the search.[18] Chief Justice Vinson attempted to reconcile the decision with *Go-Bart* and *Lefkowitz* by commenting:

> In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search.[19]

The ink was hardly dry on the *Harris* opinion when the Court did a complete turnabout in 1948 in *Trupiano v. United States.*[20] A government agent was planted inside an illicit distillery operated by Trupiano and others. The agent assisted in the erection of the distillery and worked as a "mash man" during the entire time of its existence. After the distillery had been in operation for approximately one month, the agent advised his superiors of the most opportune time to make a raid. With neither arrest warrants nor a search warrant, government agents descended upon the site, looked into the building, and caught the unsuspecting bootleggers in the very act of cooking their brew. The distillery was seized as evidence and aided in the conviction of Trupiano and his compatriots.

The minority in *Harris,* joined by Justice Douglas, reversed the convictions, holding that while the arrests were lawful and although the distilling equipment was in plain view when the arrests were made, the seizure of the distillery was unreasonable since a search warrant had not been procured and there had been adequate opportunity to obtain one before the raid:

> [W]e cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable.[21]

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[17] Unlawful possession, concealment and alteration of notice of classification cards and registration certificates.

[18] 331 U.S. at 152-53. The Court stated:

> The same meticulous investigation which would be appropriate in a search for two small cancelled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. [*Id.* at 152.]

[19] *Id.* at 155.

[20] 334 U.S. 699 (1948).

[21] 334 U.S. at 705.

As the smoke began to clear after *Trupiano,* the question again came before the Supreme Court in 1950 in *United States v. Rabinowitz.*[22] Confusion was added to confusion.[23]

Rabinowitz had a previous conviction for alteration of United States postage stamps. Postal authorities received information that he was again practicing his illegal trade by selling stamps bearing forged overprints. An officer was sent to make a "purchase," and tests revealed that the stamps did in fact bear forged overprints. Exactly one week later officers armed only with an arrest warrant converged upon Rabinowitz' shop, arrested him, and conducted a search which yielded 573 stamps bearing forged overprints. On the basis of that search, Rabinowitz was convicted.

The court of appeals, relying on *Trupiano,* reversed Rabinowitz' conviction. The Supreme Court, however, reversed the court of appeals and applied the standards announced in *Harris.* The Court held that the fourth amendment only prohibits unreasonable searches and that under the circumstances of this case, the search of Rabinowitz' shop was reasonable.

Justice Minton announced the test for determining reasonableness:

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.[24]

Trupiano was overruled to the extent that it required a search warrant when practicable to obtain one.

For nineteen years following *Rabinowitz,* the question of search incident to arrest was characterized by relative calm. *Rabinowitz* and *Harris* served as the guiding standards in evaluating the permissible scope of such searches.[25] Then in 1965 California police officers arrested Ted Chimel in his home on a warrant charging burglary. The question of the reasonableness of a search of his home made incident to that arrest reached the Supreme Court in 1969.

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[22] 339 U.S. 56 (1950).

[23] Justice Black, apparently somewhat dismayed, stated: "The Trupiano case . . . added new confusion 'in a field already replete with complexities.' But overruling that decision merely aggravates existing uncertainty." *Id.* at 67 (dissenting opinion).

[24] 339 U.S. at 63.

[25] *See, e.g.,* Abel v. United States, 362 U.S. 217 (1960).

B. Chimel v. California[26] *Another Shift*

Following Chimel's arrest for the burglary of a coin shop, officers conducted a warrantless search of his entire three-bedroom house. The search resulted in the seizure of various coins. Over Chimel's objection, the coins were admitted into evidence at his trial, resulting in his conviction.

The Supreme Court reversed the conviction, holding that the scope of the search was unreasonable under the fourth amendment. *Harris* and *Rabinowitz* were expressly overruled to the extent they are inconsistent, and the confusion of earlier years was revived.[27]

The Court returned to the rationale announced in *Trupiano v. United States.*[28]

> A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. *But there must be more in the way of necessity than merely a lawful arrest.*[29]

The distinguishing aspect of *Chimel* is that for the first time the Supreme Court attempted to delineate the permissible scope of a search incident to an arrest, rather than merely state that the scope must be "reasonable". The Court stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . .In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course be governed by a like rule. . .There is ample justification, therefore, for a search

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[26] 395 U.S. 752 (1969).

[27] Note, *Searches and Seizures: The Chimel Decision and Police Procedures,* 6 Calif. W. L. Rev. 164 (1969). In characterizing the *Chimel* decision, the author states:

> Search and seizure laws have again been subjected to a confusing Supreme Court decision. From the point of view of law enforcement, standing laws have been disregarded and replaced by a court decision of questionable value. [*Id.* at 177.]

Contra, Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding,* 11 Ariz. L. Rev. 457 (1969).

[28] 334 U.S. 699 (1948).

[29] Chimel v. California, 395 U.S. at 759, *quoting* Trupiano v. United States, 344 U.S. at 708 (emphasis added).

> of the arrestee's person and the area "within his immediate control"—construing that phrase to mean *the area from within which he might gain possession of a weapon or destructible evidence.*[30]

Although it once again raised the spectre of instability in the law of search and seizure, the *Chimel* decision provided workable standards by which warrantless searches incident to an arrest in the home may be evaluated. Those standards may be summarized as follows.

1. A search of the person made contemporaneously with the arrest is justified by the need to seize weapons and evidentiary material.

2. A search is likewise justified of the area within the "immediate control" of the arrestee—that area within his reach from which he might obtain a weapon or evidentiary material.[31]

3. Once an arrestee is subdued and is unable to gain access to areas from which he might obtain a weapon or evidentiary material, a search which goes beyond his person cannot be justified.

What *Chimel* did not say explicitly and which must be drawn by implication is that the situation which confronts the officer at the time of arrest must produce necessities which will justify the initiation of a search. The implication is that not every lawful arrest, regardless of where it takes place, will produce necessities justifying a search either of the person or the place where he is arrested. While it is granted that most arrest situations provide ample justification for at least a protective search of the person for weapons, it is submitted that the situation confronting an officer in a typical traffic arrest provided no such justification.

II. THE AUTOMOBILE SEARCH: DO DIFFERENT STANDARDS APPLY?

A. The Cases

In 1925 in *Carroll v. United States,*[32] the Supreme Court recognized a constitutional difference in the circumstances justifying a warrantless search of an automobile as opposed to a home or an office. In *Carroll* prohibition agents spotted a automobile belonging to individuals with whom the agents, while acting in an undercover capacity, had previously negotiated for the purchase of illicit liquor. The agents, believing that illegal liquor was being transported in the car, stopped it and made a search. The search revealed large quantities of liquor, which was seized and used by the prosecution in convicting Carroll for the illegal transportation of intoxicating liquor.

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[30] 395 U.S. at 762-63 (emphasis added).

[31] The feasibility of applying this standard is doubted by some writers. *See generally* Carrington, *Chimel v. California—A Police Response,* 45 NOTRE DAME LAW. 559 (1970).

[32] 267 U.S. 132 (1925).

The Supreme Court affirmed the conviction, stating:

> [I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. . . .[33]

The Court continued:

> [T]he guaranty of freedom from unreasonable searches and seizures . . . has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a . . . dwelling house . . . in respect of which a proper official warrant readily may be obtained and a search of a[n] . . . automobile for contraband goods, where it is not practicable to secure a warant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[34]

Although the Court recognized a constitutional difference in the warrantless search of an automobile and a like search of a house, it was stressed that vehicular searches must nevertheless be reasonable. In the circumstances of *Carroll,* reasonableness meant probable cause to believe that the automobile contained contraband.

The rationale of *Carroll* was followed through the years, the Supreme Court continuing to insist that probable cause be shown before a warrantless search could be justified.[35]

In 1964 the Supreme Court was presented with a new question in *Preston v. United States*:[36] can a warrantless search of an automobile be justified as incident to an arrest when the search is removed in time and place from the arrest? Preston and two companions were arrested on a charge of vagrancy while they were sitting in an automobile. They were taken to the police station to be booked and their car was taken to a garage. Soon after the booking officers went to the garage and conducted a thorough search of the car. The search produced items which led to the conviction of Preston and his companions on a charge of conspiracy to rob a federally-insured bank.

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[33] *Id.* at 149.

[34] *Id.* at 153.

[35] Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931). *See also* Gambino v. United States, 275 U.S. 310 (1927).

[36] 376 U.S. 364 (1964).

Before the Supreme Court the Government argued that the search was justified as incidental to a lawful arrest. The Court, however, reversed the convictions, noting that contemporaneous searches incident to arrest are justified by the need to seize weapons and prevent the destruction of evidence of the crime; that the right to search extends to things under the "immediate control" of the arrestee, and, depending on the circumstances of the arrest, to the place where he is arrested; but that those justifications are absent when the search is remote in time and place from the arrest. Justice Black stated:

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.[37]

In reaching its decision, the Court assumed that the police had the right to search the car when they first came on the scene and that there are fruits or implements of the crime of vagrancy which are capable of being seized.

In 1967 the Supreme Court was again presented with a new question in *Cooper v. California*.[38] Cooper was arrested on a narcotics charge and pursuant to a California statute, his automobile was impounded pending forfeiture proceedings. A week after the arrest police conducted a search of the car and found items which aided in Cooper's conviction on the narcotics charge.

The California District Court of Appeal held that under the *Preston* doctrine the search was unreasonable but concluded that use of the evidence seized was harmless error.[39] The Supreme Court, affirming the conviction, did not reach the question of harmless error, since it was convinced that the lower court had misapplied *Preston*. Justice Black, author of the *Preston* opinion, distinguished *Cooper* from *Preston* on the grounds that the reason the police had custody of Preston's car and its subsequent search was totally unrelated to the vagrancy charge for which he was arrested, whereas, in this case the automobile had been seized as evidence and the search was closely related to the offense for which Cooper was arrested. The Court further stated that since the police must retain custody of the car until the culmination of forfeiture proceedings, it would be unreasonable to hold that they did not have the right, "even for their own protection, to search it."[40]

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[37] *Id.* at 367.

[38] 386 U.S. 58 (1967).

[39] People v. Cooper, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (Cal. Dist. Ct. App. 1965).

In 1968 in *Dyke v. Taylor Implement Manufacturing Co.*,[41] the Supreme Court was presented with a factual situation similar to that in *Preston* but decided the case on different grounds. In connection with a labor dispute, an injunction was issued against inflicting harm or damage to the person or property of employees of Taylor Implement. The home of a non-striking employee was fired into from a passing automobile, and the incident was reported to the local sheriff. Later in the evening, a deputy spotted a "suspicious" car and began following it. The car sped away but was stopped by officers in a neighboring town who had been alerted by the deputy to be on the lookout for a speeding car. The deputy reached the stopped car, arrested its driver for reckless driving, and took him, his car, and his two passengers to jail. While the three were waiting inside the jail, officers searched the car and found an air rifle under the front seat. Testimony relating to the finding of the air rifle, coupled with the fact that an air rifle pellet was found outside the home of the Taylor employee resulted in the conviction of the three for criminal contempt.

Although in reversing the convictions the Supreme Court noted that under the reasoning of *Preston* the search could not be justified as incident to arrest,[42] it held that the deciding question was whether or not the officers had probable cause to initiate the search. The Court concluded that at the time the search was made, the officers did not have "reasonable or probable cause to believe that evidence would be found in petitioners' car."[43]

The latest Supreme Court pronouncement on vehicle searches came in 1970 in *Chambers v. Maroney*.[44] Following the robbery of a service station, police officers obtained from eye-witnesses a description of the felons and the automobile they were driving. A short time later police officers saw a car matching the description of the getaway car, occupied by four men matching the description of the felons. The car was stopped, its occupants arrested, and the car taken to the police station where it was thoroughly searched. The search revealed the ill-gotten fruits of the service station robbery and evidence which connected Chambers with a previous robbery. All of the seized items were introduced into evidence at Chambers' trial, resulting in his conviction for both robberies.

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[40] 386 U.S. at 61-62.

[41] 391 U.S. 216 (1968).

[42] The Court stated that since the search was not made "incident" to the arrest for reckless driving, it need not consider whether an automobile may be constitutionally searched incident to an arrest for a traffic violation. *Id.* at 220.

[43] *Id.* at 220-21.

[44] 399 U.S. 42 (1970)

The Supreme Court with only one dissenter affirmed the convictions. *Preston* and *Dyke* were distinguished on the grounds that in neither of those cases, did the police have probable cause to believe that evidence of crime was concealed in the automobile. In this case, however, the Court noted that there was ample justification for the officers' belief that the automobile contained evidence of crime. Moreover, if the police were forced to go through the process of obtaining a search warrant, they would have to seize the automobile for the period necessary to obtain the warrant or run the risk that the automobile might be removed and evidence destroyed. The Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate warrantless search. *Given probable cause to search,* either course is reasonable under the Fourth Amendment.[45]

B. The Standards: How They Differ

Unlike the question of a warrantless search of a home incident to arrest, when the constitutional standards may be derived from one case—*Chimel v. California*[46] the standards applicable to a warrantless search of an automobile must be gleaned from the foregoing cases on a patchwork basis. They may be summarized as follows:

1. In evaluating any search of an automobile or other conveyance, it must be kept in mind that there is a constitutional difference, due to its mobility, between a conveyance and a house. Probable cause will justify a warrantless search of the former, but not of the latter. (*Carroll v. United States.*[47])

2. Once probable cause for the search of an automobile is established, that is, when there is reasonable cause to believe that evidence is con-

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[45] *Id.* at 52.

[46] 395 U.S. 752 (1969).

[47] 267 U.S. 132 (1925).

cealed in the car, there is no limitation on the scope of the search. (*Chambers v. Maroney*.[48])

3. When, however, the search is made incident to an arrest, and the circumstances of the arrest do not furnish the officers probable cause to believe that evidence is concealed in the car, the search is limited in scope to the area within the arrestee's "immediate control". (*Preston v. United States*.[49])

4. When the automobile itself is seized and impounded as evidence, a warrantless search may be conducted at any time while the automobile remains in police custody. (*Cooper v. California*.[50])

5. If a search is to be justified as incident to an arrest, it must take place contemporaneously with the arrest. (*Preston v. United States*,[51] *Dyke v. Taylor Implement Manufacturing Co*.[52])

6. When at the time of arrest the officers have probable cause to believe that evidence is concealed in the car, the car may be removed from the scene of arrest and searched without a warrant at another place. (*Chambers v. Maroney*.[53])

While the question of warrantless automobile searches has not been the subject of shifting standards, it is readily apparent from the foregoing that the standards which have been announced in the cases are confusing and offer no clear framework by which automobile searches may be constitutionally evaluated. It is this writer's opinion that the confusion is due to the Supreme Court's refusal in deciding the cases to go beyond the issues necessary to dispose of the case. As a necessary consequence, the constitutional standards must be determined in part, by inference.

The one factor which constantly recurs in the automobile cases is probable cause. Although the Court does not explicitly say so, it appears that the reasonableness of warrantless searches of automobiles, whether accompanied by an arrest or not, depends upon whether or not the police have probable cause to believe that evidence, i.e., fruits or implements of crime, weapons, or contraband, are concealed in the car. In *Carroll*, where the search preceeded the arrest, probable cause was the only basis for justifying the search. In *Preston*, although the Court assumed that the search could have taken place contemporaneously with the arrest, it was stressed that warrantless searches incident to arrest are justified by the need to seize weapons and destructible evidence. The implication of *Preston* is that if the arrest situation does not present the necessity of seizing weapons or evidence, a search is unreasonable. In *Cooper* the Court noted that in *Preston* the search was totally unrelated to the offense for which the arrest was made (vagrancy), whereas in *Cooper* the search was directly related to the narcotics charge. Moreover, in *Dyke,* while expressly pretermitting the question of the constitutionality of a serch incident to an arrest for a traffic violation, the Court held the search unreasonable because the officers did not have "reasonable or probable cause" to believe that evidence would be found in the car. Finally in *Chambers* the Court held that with probable cause to search and a danger that the automobile may be removed and evidence destroyed, a warrantless search is permissible, whether made at the scene of the arrest or at another place.

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[48] 399 U.S. 42 (1970).

[49] 376 U.S. 364 (1964).

[50] 386 U.S. 58 (1967).

[51] 376 U.S. 364 (1964).

[52] 391 U.S. 216 (1968).

[53] 399 U.S. 42 (1970).

It is this writer's opinion that the true test in evaluating warrantless automobile searches incident to arrest is similar to that in the case of a home or office. The search must be justified by the exigent circumstances existing at the time of arrest and cannot be predicated on merely a lawful arrest. Not every arrest situation will involve circumstances justifying either a search of the person or the automobile, i.e. traffic arrest. If, however, the situation at the time of arrest furnishes probable cause to believe that evidence is concealed in the automobile, a warrantless search, unlimited in scope, may be conducted immediately at the scene of the arrest or removed from the scene in a place more convenient for the arresting officers.

Thus, while the automobile is a constitutionally protected area, the protection it receives must give way to practicality and the public good. The warrant requirement cannot be imposed when the police have a moving target. On the other hand, dispensing with the warrant requirements does not amount to an open season on automobile searches. Before a search is initiated, incident to arrest or not, the police must be able to point to constitutionally valid reasons for its initiation.

IV. APPLICATION OF THE STANDARDS: SEARCH INCIDENT TO TRAFFIC ARREST

A. The Mississippi Rule

The Mississippi rule on the search of an automobile incident to an arrest for a traffic violation was clearly stated in 1967 in *Watts v. State.*[54]

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[54] 196 So. 2d 79 (Miss. 1967).

Watts' automobile was observed by highway patrolmen as it weaved back and forth across its lane of traffic. Upon stopping Watts and requesting to see his drivers license, the patrolman determined that he was intoxicated. Watts was placed under arrest for reckless driving, removed from the car, and personally searched. While Watts was in the custody of his partner, the arresting patrolman opened the car door on the passenger side, shined his light into the car and detected a pistol lying under the front seat. Over Watts' objection that the search was unlawful, the pistol was admitted into evidence at his subsequent trial for reckless driving and carrying a concealed weapon. He was convicted on both charges.

Although Watts' conviction was reversed on other grounds,[55] the Mississippi Supreme Court devoted much of the opinion to stating "some of the basic Mississippi rules with reference to searches and seizures as they apply to the facts of this case."[56]

The court stated the general rule as follows:

> No search warrant is necessary in order to search the vehicle in which a person is riding at the time of his arrest for an offense committed in the presence of the officer, including a felony or a misdemeanor; and such a search is not unreasonable under the constitutional guaranty. . .[57]

The court continued:

> Where the driver of an automobile is arrested while in the act of committing a *felony* or *misdemeanor,* as, for instance, *driving while intoxicated,* or *driving without lights or without license plates, or illegally transporting intoxicating liquor, the right to* search follows as an incident . . .[58]

Several Mississippi cases[59] were cited in support of the general rule, and it was pointed out that the "general right to search vehicles as an incident to a lawful arrest extends to cases involving traffic violations as well as to more serious offenses."[60]

Although it was recognized that there were some states which did not follow the general rule (naming California, Florida, Illinois,

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[55] Discrimination in jury selection.

[56] 196 So. 2d at 83.

[57] *Id.* at 84, 85, *quoting* 79 C.J.S. *Searches and Seizures* § 68 (e) (1952).

[58] 196 So. 2d at 86, *quoting* 9-10 X. HUDDY, ENCYCLOPEDIA OF AUTOMOBILE LAW § 168 (9th ed. 1931).

[59] Fuqua v. State, 246 Miss. 191, 145 So. 2d 152 (1962); Smith v. State, 240 Miss. 738, 128 So. 2d 857 (1961); Gause v. State, 203 Miss. 377, 34 So. 2d 729 (1948); Thompson v. State, 153 Miss. 593, 121 So. 275 (1929).

[60] 196 So. 2d at 86.

Michigan and Oklahoma), the court concluded that these were jurisdictions which have taken exception to the general rule and were in a minority.

The *Watts* rule can be described as categorical. So long as the arrest is lawful, regardless of the offense involved, the arresting officer has the absolute right, as an incident of the arrest, to search the automobile from "stem to stern".[61] When this rule is examined in light of the standards previously stated, it fails to meet the test of reasonableness.

The glaring deficiency is that there is no requirement of a showing of probable cause to search. As was stated previously, most arrest situations involved the risk of weapons and in the greater proportion of them there is the possibility of seizing evidence of the crime. Such is not the case with the ordinary traffic offense. It is neither probable nor reasonable to believe that the traffic offender is armed and dangerous or that his automobile contains evidence of crime.[62] To allow a search based solely on the legality of an arrest for a traffic violation is to sanction general and exploratory searches.[63]

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[61] Note the stricter requirements where the search is not conducted at the scene of the arrest. In King v. State, 230 So. 2d 209 (Miss. 1970), defendant's car was searched twice while he was in jail on a charge of switching auto tags. The court held both searches unlawful, stating, "this is true even if the officers had a right to search the automobile as an incident to an arrest at the time the arrest was made." *Id.* at 211 *Accord,* Kent v. State, 241, So. 2d 657 (Miss. 1970).

[62] *E.g.,* Hotis, *Search of Motor Vehicles,* 73 DICK. L. REV. 363 (1968), where the author states:

> Obviously, a search cannot be made where there is no tangible evidence connected with the arrest offense. That is usually the case where violations of motor vehicle codes are involved. With the exception of driving while under the influence of alcohol or narcotics, there are few traffic offenses in which any object other than the vehicle itself can be considered evidence of the crime. For this reason, the search incident to a traffic arrest is not permitted in most jurisdictions. [*Id.* at 458-59.]

[63] *Watts* has been criticized by the writers. *See, e.g.,* J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES (1969 ed.), where the author states:

> The weight of recent case law, though recognizing the right to stop cars and detain their occupants temporarily, denies any right in the officers to make a routine search either of the driver or the occupants. [citations omitted] Though there are cases taking the opposite view [citing *Watts*], there may be justification for the conclusion, if not the reasoning, in some of them. In *Watts,* for example, the arrest was for reckless driving, the officer noted that the driver was intoxicated, and the search was initially for liquor, which might have made the search appropriate under...probable cause....[*Id.* at 70]

B. Other Jurisdictions

The list of jurisdictions which do not follow the "general rule" announced in *Watts* has grown from the five named in that case to a total of twenty-five.[64] Virtually all of the jurisdictions which have recently had occasion to decide the question of the constitutionality of a search incident to a traffic arrest have agreed that more than a lawful arrest must be shown.[65] The following is typical of the reasoning of those cases:

> To consider all searches for weapons incidental to an arrest as reasonable per se would permit wholesale fishing expeditions whenever an arrest is made.[66] (Alabama)
>
> The reasonableness of a search, incident to . . . [an] arrest, both in terms of its initiation and scope, . . . depend entirely upon the facts and exigent circumstances, then existing.[67] (Indiana)

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[64] United States v. Adams, 424 F.2d 175 (5th Cir. 1970) (driving while intoxicated); Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968) (speeding); Barrentine v. United States, 434 F.2d 636 (9th Cir. 1970) (driving while intoxicated); United States v. Davis, 441 F.2d 28 (9th Cir. 1971) (driving on wrong side of street); United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969) (violation of city traffic ordinance); Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967), *appeal dismissed sub nom.*, 404 F.2d 644 (5th Cir. 1968) (illegal muffler, no drivers license); United States v. Tate, 209 F. Supp. 762 (Del. D. 1962) (speeding); McCurdy v. State, 42 Ala. App. 646, 176 So. 2d 53 (1965) (speeding); State v. Quintana, 92 Ariz. 267, 376 P.2d 130 (1962) (speeding); People v. Superior Court, 3 Cal. App. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970) (speeding); Gustafson v. State, 243 So. 2d 615 (Fla. Ct. App. 1971) (weaving of car prompted investigation leading to arrest for driving without license); Rowland v. State, 117 Ga. App. 577, 161 S.E.2d 422 (1968) (running stop light); State v. Hanawahine, 50 Hawaii 461, 443 P.2d 149 (1968) (speeding); People v. Mayo, 19 Ill. App. 2d 136, 166 N.E.2d 440 (1960) (illegal parking); Paxton v. State, 263 N.E.2d 636 (Ind. 1970) (reckless driving); Lane v. Commonwealth, 386 S.W.2d 743 (Ky. 1965) (improper passing, no drivers license); Commonwealth v. McCleery, 186 N.E.2d 469 (Mass. 1962) (one headlight); Sedacca v. State, 2 Md. App. 617, 236 A.2d 309 (1968) (running stop sign); People v. Gonzales, 356 Mich. 247, 97 N.W.2d 16 (1959) (one headlight); State v. Meeks, 467 S.W.2d 65 (Sup. Ct. Mo. 1971) (expired license plate); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967) (speeding); State v. Campbell, 97 N.J. Super. 435, 235 A.2d 235 (1967) (one headlight); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970) (running stop light); Lawson v. State, 484 P.2d 1337 (Okla. 1971) (speeding); State v. Krogness, 238 Ore. 135, 388 P.2d 120 (1963), *cert. den.* 377 U.S. 992 (1964) (speeding); Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971) (no tail lights); Elliott v. State, 173 Tenn. 703, 116 S.W.2d 1009 (1938) (speeding); Barnes v. State, 25 Wisc, 2d 116, 130 N.W.2d 264 (1964) (no brake lights). *Accord,* cases cited in Annot., 10 A.L.R.3d 314 (1966).

[65] *But see* Lane v. State, 424 S.W.2d 925 (Tex. 1968), *cert. denied* 392 U.S. 929 (1967).

[66] McCurdy v. State, 42 Ala. App. 646, 176 So. 2d 53, 56 (1965).

[67] Paxton v. State, 263 N.E.2d 636, 641 (Ind. 1970).

> Under the evidence, [arrest for expired license plate and no drivers license] the search of the car constituted nothing more than a purely exploratory venture—a fishing expedition, and was not justified as incidental to this particular arrest nor as based on probable cause.[68] (Missouri)

It is significant that the Fifth Circuit Court of Appeals held in 1968 that an arrest for a traffic violation, absent special circumstances, does not provide a lawful basis for a search.[69] This clearly opens the way for the successful prosecution of federal habeas corpus proceedings by Mississippi defendants convicted on the basis of evidence seized during such illegal searches.[70]

V. Conclusion

The law of search and seizure incident to arrest has been in a constant state of change since its beginnings. It appears that the future offers more of the same. Although we are theoretically a government of laws, this area of the law demonstrates more aptly than any other that we are, in fact, a government of laws only as they are interpreted by a majority of nine men. As the ideological balance of the United States Supreme Court shifts, the standards of the fourth amendment will likewise shift.

This writer is of the opinion that the current Supreme Court doctrine places too much emphasis on the warrant requirement in search incident to arrest cases. The better view is that the fourth amendment only prohibits unreasonable searches. Given probable cause to arrest *and* probable cause to search, it is doubtful that the issuance of a search warrant will make the search more "reasonable." If in their zeal to find and seize evidence of the crime, the arresting officers overstep the bounds of reasonableness, the exclusionary rule may be applied to the extent that the search was unreasonable. In this manner the right of society to bring the criminal to the bar of justice is more equitably balanced with the right of the individual to privacy in his person, home, and effects.

On the other hand, the automobile cases reveal a more realistic approach. Given reasonable grounds, which are subject to later judicial scrutiny, the warrantless search of an automobile, unlimited in scope, may be conducted without the necessity of making a prior lawful arrest. If the search is initiated as an incident to an arrest, the probable cause factor is no less obtaining, and the search must be governed by the exigent circumstances of the arrest.

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[68] State v. Meeks, 467 S.W.2d 65, 66 (Sup. Ct. Mo. 1971).

[69] Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968). *Accord,* United States v. Adams, 424 F.2d 175 (5th Cir. 1970).

[70] *See* Grundstrum v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967), *appeal dismissed sub nom.,* 404 F.2d 644 (5th Cir. 1968).

The Mississippi rule which allows the search of an automobile and its occupants incident to a traffic arrest without questioning the motivation for such a search is clearly out of line with the weight of recent case authority and the reasoning of the United States Supreme Court. In short, a search of the person or his car incident to a traffic arrest is unreasonable unless there are circumstances, indicating probable cause, that something more serious is afoot than a mere traffic violation.[71] In light of what has been said, *Watts* should be re-evaluated at the earliest possible opportunity and modified so as to insure that when a citizen gets into his automobile and merely violates a traffic regulation, his citizenship does not become second-class.

Franklin C. McKenzie, Jr.

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[71] Cases in which the traffic offender is actually taken into custody rather than merely issued a summons should be distinguished to allow a protective frisk for weapons to insure the safety of the arresting officers.

CHANGES IN THE CRIMINAL JURY

I. INTRODUCTION

The jury system, which provides justice for each litigant, and assures fair play and equality for all before the law, is one of the most time-honored and hallowed institutions of the democratic process. Consequently the criminal jury has remained basically unchanged in form and substance since its incorporation into the law of the land at the inception of this nation. Reluctance to alter a precept steeped in tradition, while readily understandable, surely should not be permitted to impede a periodic reappraisal for the purpose of updating juristic procedures in order to meet the crying demands of changing times. This paper will outline current problems in the present jury system.

Attention must be drawn at the outset to the demographic characteristics of the United States in the twentieth century as compared to those of the eighteenth century when the nation was born.[1] Little need be said by way of underscoring the vast differences in population, urban centers, educational and vocational patterns, and general mobility of huge sements of the population. This has been a century of change, and Mississippi has not been immune. While Mississippi's problems are not as acute as those of more populous states, the state can anticipate steadily increasing difficulties as the number of residents increases. While the fundamental concepts of government and justice propounded by the fathers of the nation do and will continue to serve her in good stead, the country must modify these concepts as need dictates.

Need asserts itself in vigorous form when one takes stock of two mutually disserving elements: the rising crime rate and the increasing backlog of cases on the criminal docket.

Surprisingly, in an impassioned article entitled "Abolish the Jury," J. C. McWhorter most ably penned words in 1923 which speak to the days of 1971:

> The criminal law especially, with its cumbersome machinery, is so far breaking down as a protector of society that it has be-

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[1] T. FISHER, OUR OVERCROWDED WORLD 47 (1969).

Mr. Fisher states that in 1790 there were approximately four million Americans and quotes Thomas Jefferson as saying that before an area as far west as Mississippi would be thickly settled, a thousand years would pass. After the first settlers came, it took three hundred years for the population to reach 100 million in 1915; by 1967 the population had climbed to 200 million, doubling in only fifty-two years. *Id.* at 117.

> come apparently impotent to stay the crime wave that seems to be sweeping over the whole country, and criminals are becoming more bold and defiant and courts less able to supress them. Life is being held cheap, and the public mind is becoming so accustomed to lawlessness that it is acquiring that listless indifference which long and uncorncerned familiarity begets. Unpunished crime is becoming a matter-of-course thing in the public mind.[2]

One need only study the news media for confirmation. Throughout the nation citizens are afraid to walk the street at night and even small Mississippi communities are beginning to expect more lawlessness than ten years ago.[3]

Hand in hand with the rising crime rate come increasing arrests, and it follows inexorably that the legal system cannot cope as it should. There are not enough courtrooms, judges, or hours in the day to handle the overload. Statistics for Mississippi have not been available. In Massachusetts one writer, urging a reduction in the number needed to comprise a criminal jury, offers the following statistics: "As of the last date for which official statistics are available, June 30, 1969, the Superior Court had a backlog of 18,306 untried criminal cases and had pending an undisposed civil docket of 65,295 cases."[4] One writer in Minnesota, reviewing a state decision[5] wherein it was held that a person charged with driving while intoxicated (violation of a municipal ordinance) was entitled to a jury trial in municipal court, mourned that while prior to the decision the delay in the Minneapolis Municipal Court calendar was approximately three months, after that decision the average delay climbed to nearly two years.[6]

The cost factor provides a third element which cannot be ignored. No one wishes to evaluate criminal justice in terms of dollars and cents, but various levels of government have only a limited amount of money to allocate to the administration of the judicial system. This is not a problem which can be dealt with in the abstract, for the time always comes when expenditures exceed revenues. One can be certain that there are many expenditures. The salaries of the judge, the court reporter, and the baliff must be paid, as well as those of the sheriff and from one to any number of deputies whose time on the job is lost while these officers attend trials. There is cost when the defendant awaits his trial in jail, when expert testimony is required, when pleadings, declarations, and motions are filed, when subpoenas are issued, when numbers of witnesses must appear, when exhibits must be prepared, and when jurors are impaneled. Impaneled jurors must serve for the duration and must be fed, bedded, and sequestered when necessary. It should be noted that costs in a city of any size will tend to be greater than those of the small community indigenous to Mississippi. It is difficult to establish averages, since cases may vary drastically according to legal complexity and the seriousness of the offense. However, one attorney estimated that he spends two to eighteen hours interviewing his client in preparation of his defense, that other pre-trial preparation would average ten to twenty hours, and that one "average" case might total forty to eighty hours before its completion.[7] Adding his estimate of the cost of office overhead, he readily admitted that unless the case was a highly unusual one, his recompense on a hourly basis would not begin to compare with that amount he would receive for a civil case requiring the same amount of time. This was supported by a Mississippi county attorney.[8] He added further that the salary he receives does not begin to cover the costs of the prosecutions and the difference must be met through his civil practice. In a thorough analysis of criminal jury trials, one writer concludes that the average attorney frequently winds up working at less than minimum wage when he undertakes to defend a criminal charge.[9]

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[2] McWhorter, *Abolish the Jury,* 57 Am. L. Rev. 42 (1923).

[3] 1970 Uniform Crime Reps., 3-4. The "crime rate" is based on the number of offenses per 100,000 population. Starting with a base of a thirteen per cent increase in the population, compare the rise of the crime rate by 144% over that ten year period with crimes of violence rate up 126% and crimes against property rate up 147%.

[4] Moss, *The Twelve Member Jury in Massachusetts—Can It Be Reduced?,* 56 Mass. L.Q. 65 (1971). Mr. Moss takes his statistics from an address made at the midwinter meeting of the Massachusetts Bar Association on January 23, 1971.

[5] State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959).

[6] Note, *Right to a Jury Trial for Persons Accused of an Ordinance Violation,* 47 Minn. L. Rev. 93, 105 (1962).

There are other hidden costs which must be considered. Whenever people are involved in the trial process there is time for traveling, time lost from jobs which in total must affect national productivity, time lost waiting for the trial to commence, time lost during recess; the list could be endless. Whenever events, such as remanding for a new trial or inability to agree on a verdict, conspire to negate a trial procedure, then the total is lost.

Because of these factors of crime, delay, and cost, the trial system has received much attention from those whose consciences demand a grappling with the dilemma, and the criminal jury has been the subject of prolific writing for many decades. There seems to be general agreement that criminal juries must somehow be modified to keep up with the changing pace, and alternatives to the twelve-man-unanimous-verdict-jury, ranging from abolition to an interesting suggestion by one writer to tape and edit trials to show later to juries of large numbers in their own homes for deliberation there.[10] The most frequently proposed modifications are the reduction of the number needed to comprise a criminal jury and acceptance of a majority verdict.

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[7] Interview with Omar Dell Craig, practicing attorney, in Oxford, Mississippi, September 30, 1971.

[8] Interview with Vettra Glen Alderson, County Attorney for Lafayette County, Mississippi, in Oxford, Mississippi, September 30, 1971.

[9] J. BRENNAN, THE COST OF THE JUDICIAL SYSTEM, 81-105 (1966).

II. Changes In The System

A. Fewer Than Twelve Jurors

No attempt will be made to furnish the reader with a thorough historical background of the development of what is called a jury today as there has already been much written on that topic.[11] While most historians are finally in agreement that the right of trial by jury was not one of the rights wrung from King John in the Magna Carta,[12] the origin of the number twelve remains buried in the hazes of yesteryear, and many continue to disagree. Sir Patrick Devlin writes:

> Many romantic explanations have been offered of the number twelve — the Twelve Tribes of Israel, the Twelve Partiarchs, and the Twelve officers of Solomon recorded in the Book of Kings, and the Twelve Apostles. Not all of these suggestions are equally happy; the first implies that there may be a thirteenth juror who got lost somewhere in the corridor, and the last that there is a Judas on every jury.[13]

Although the approach may seem light-hearted, the concept of twelve becomes important when one attempts to justify that precise number in terms of the modern jury. The Sixth Amendment to the Constitution of the United States requires that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district. . . ."[14] There is authority for the extension of the right of trial by jury to state actions,[15] but there has been controversy concerning the things which the amendment does not say, namely that the jury must consist of twelve men or that the verdict must be unanimous. The arrival of *Williams v. Florida*[16] gave the Supreme Court an opportunity to discuss and decide this point. Williams was convicted of robbery under a Florida statute which provided for a six-man jury in all but capital cases, his pre-trial motion for the impaneling of a twelve-man jury having been denied. The Florida District Court of Appeals affirmed his conviction and sentence of life imprisonment, and the Supreme Court affirmed, Justice Marshall dissenting. The Court took the opportunity to discuss at length the historical basis for the interpretation of the modern jury and, citing the annals of the First Congressional Session, stated that in the framing of the Constitution, a motion was made to restore the words providing for trial. . . . "by an impartial jury of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . ."[17] This motion failed, and the Sixth Amendment emerged as it is today, the Court opined, because it was the intent of the framers not to include provisions requiring the states to insure a criminal trial by a jury of twelve men nor to require a unanimous verdict. By way of emphasis, the Court stated:

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[10] *Id.* at 128-134.

[11] For helpful discussion *see* P. Devlin, Trial By Jury (1956); W. Forsyth, Trial By Jury (1875); Haralson, *Unanimous Jury Verdicts in Criminal Cases,* 21 Miss. L.J. 185 (1950); White, *Origin and Development of Trial by Jury,* 29 Tenn. L. Rev. 8 (1961).

[12] Clark, *Magna Carta and Trial by Jury,* 58 Am. L. Rev. 24 (1924).

[13] P. Devlin, Trial By Jury 8 (1956).

[14] U.S. Const. amend. VI.

[15] Duncan v. Louisiana, 391 U.S. 145 (1968).

> [T]he fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics."[18]

Thus, the highest court in the land has ruled that the states are not required to follow common law precedents and may enact such legislation as they feel best meets their particular requirements for the trial of criminal cases.

More than half of the states have enacted legislation allowing a less than twelve-man jury to return a verdict in cases of misdemeanors, and some states so permit for what they define as lesser felonies. Mississippi has permitted juries of six to deliberate in justice of the peace courts,[19] as have many other jurisdictions. Utah has recently confirmed her faith in the constitutionality[20] of her eight-man criminal jury, permitted in all but capital cases.[21] Louisiana allows a five-man jury for trial of lesser felonies and misdemeanors.[22] Mississippi, however, has made no definite pronouncement and requires only in the constitution that the accused be provided "a speedy and public trial by an impartial jury of the county where the offense was committed."[23] Mississippi courts have long adhered to common law, stating in 1834:

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[16] 399 U.S. 78 (1970). FLA. STAT. ANN. § 913.10 (Supp. 1971), provides for a jury of six men in all criminal cases except those for a capital offense. Hearns v. State, 223 So. 2d 738 (Fla. 1969), *cert. denied,* 399 U.S. 929 (1970); Morgan v. State, 223 So. 2d 801 (Fla. Dist. Ct. App. 1969), *cert. denied,* 399 U.S. 933 (1970).

[17] Williams v. Florida, 399 U.S. 78, 94 (1970). The Court took its authority from Senate Journal, Sept. 9, 1789, 1st Cong., 1st Sess., 77.

[18] Williams v. Florida, 399 U.S. 78, 102 (1970).

[19] MISS. CODE ANN. § 1836 (1956).

[20] State v. Langley, 25 Utah 2d 29, 474 P.2d 737 (1970).

> It is equally clear to my mind that the individuals who were charged with the issue were not a legal and constitutional jury. There is no jury for the trial of issues known to the constitution and laws of this state, except that which consists of "twelve good and lawful men, who are tried, elected and sworn."[24]

Fifty years later the court held that the word *jury* "necessarily imports twelve men."[25] It seems that in the absence of state constitutional requirement and present statute, Mississippi may choose at any time to abandon the common law, follow her sister states, and provide by legislative enactment for a criminal jury of other number than twelve.

B. The Majority Verdict

The development of the requirement of a unanimous jury verdict is as difficult to trace as that of the twelve-man requirement. American common law inherited the unanimous verdict concept from the English common law. Of unanimity in England, one author in 1832 wrote:

> [*A*]*nd true verdict, give,* ACCORDING TO THE EVIDENCE, SO HELP THEM GOD. After the evidence has been heard, and each man has formed his conscientious opinion upon it, he is required, however complicated and doubtful the question may be, to reconcile that opinion with those of his brother jurors, upon pain of imprisonment and starvation; and lastly, in case of inability to do this, he is imprisoned and starved accordingly, till, like a soldier at the halberts, or a heretic on the rack, he can endure no more.[26]

Although the dissenting American juror is not "beaten or starved", the over zealous judge may on occasion press too urgently his desire to have a verdict reached and in so doing cause reversible error, as happened when a Mississippi judge proposed postponing food and water until agreement was reached.[27] England no longer encounters the problem, for, unlike most American jurisdictions, that country felt the need for change and instituted the majority criminal verdict.[28] Unanimity in criminal trials runs parallel to the twelve-man jury concept in terms of the Constitution; all that was expressed by *Williams* may be applied here as well. Although the Supreme Court has yet to speak directly to the issue of unanimity in terms of its application to state actions in criminal cases, the closest it has come has been in *Duncan v. Louisiana.*[29] By statute Louisiana allows a majority verdict.[30] This statute was not in issue, as the question turned upon the right of the accused to a jury trial when the maximum possible sentence for his offense was two years, such trial by jury having been denied him. The Supreme Court held that because of the seriousness of the penalty, the offense could not be termed petty by statute; hence it necessitated a jury trial. It seems that the Court wished to say something further concerning the application of federal requirements to state actions, and in view of the Louisiana statute permitting a majority verdict, Justice Fortas expressed his view that not all federal requirements such as unanimous verdicts or juries of twelve should be imposed upon the states. Later that same day the mood prevailed, and in deliberation of *Bloom v. Illinois,*[31] wherein the accused was sentenced to twenty-four months for criminal contempt, Justice Fortas spoke of unanimity as being neither "fundamental," nor "essential to due process of law," nor "obligatory on the States."[32] He later stated in his concurrence:

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[21] UTAH CONST. art. 1, § 10.

[22] LA. CODE OF CRIM. PROC. art. 782 (1967): "Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict."

[23] MISS. CONST. art. 3, § 26.

[24] Wolfe v. Martin, 2 Miss. (1 How.) 5 (1834).

[25] Hunt v. State, 61 Miss. 577 (1884).

[26] White, *Origin and Development of Trial by Jury,* 29 TENN. L. REV. 8, 16 (1961), *citing* VII the Law Magazine or Quarterly Review 44-45 (1832).

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[27] Pope & Jacobs v. State, 36 Miss. 121 (1858).

[28] English Criminal Justice Act 1967, ch. 80, § 13.1 provides that: (1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if (a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and (b) in a case where there are ten jurors, nine of them agree on the verdict; and a verdict authorised by this subsection is hereafter in this section referred to as 'a majority verdict.' (2) A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict. (3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.

[29] 391 U.S. 145 (1968). Stating at the outset that the only rights granted by the sixth amendment and having subsequently been made mandatorily applicable to state actions are rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses, the Court developed an especially comprehensive and coherent history of the jury system.

[30] LA. CODE OF CRIM. PROC. art. 782 (1967) provides that:

> Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.

State v. Dunn, 254 La. 425, 223 So. 2d 856 (1969), *appeal dismissed,* 399 U.S. 520 (1969).

[31] 391 U.S. 194 (1968).

> Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform.
> We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.[33]

It is to those words that the several states must look when contemplating change in their traditions of common law. Certainly Louisiana is pleased with this support of the course which she has charted, and as one writer in that state so aptly states: "The Court should not ignore evolution in juridical concepts and turn back the clock 181 years, choosing stagnation rather than progress."[34]

Oregon seems satisfied with her majority of ten verdict in all criminal cases except those of first degree murder.[35] *State v. Gann,*[36] wherein the defendant was sentenced to life imprisonment for the holding of a person hostage inside a state penitentiary, provided the Oregon court with an excellent vehicle for discussion of the majority verdict. Justice Denecke addressed himself to the question, stating:

> The contention that the Fourteenth Amendment requires a unanimous verdict of twelve jurors is unacceptable for two principal reasons: (1) its cornerstone, the decision that the Sixth Amendment requires a twelve-man unanimous verdict, was reached by a sterile historical approach to the Bill of Rights which is now—and in our opinion very correctly—usually ignored by the United States Supreme Court; and (2) the "right"

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[32] *Id.* at 213.

[33] *Id.* at 214-15.

[34] Comment, *Jury Trial in Louisiana—Implications of Duncan,* 29 La. L. Rev. 118, 129 (1968).

[35] Ore. Const. art. 1, § 11 provides that:
In all criminal prosecutions, the accused shall have the right to public trial . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise. . . .

[36] 254 Ore. 549, 463 P.2d 570 (1969); State v. Osbiurne, 153 Ore. 484, 57 P.2d 1083 (1963).

> in issue, a unanimous verdict rather than a verdict by ten of the twelve jurors, is not of sufficient consequence to be fitted with constitutional rigidity.[37]

However, at least one Oregon writer is not in agreement and argues that *Duncan* must be interpreted as an effort to "leave in abeyance" the question of majority verdicts, and, further, that Oregon may find herself on "shaky constitutional footing."[38]

In 1970, in line with her progressive eight-man jury, Utah upheld conviction by seven jurors when sudden illness incapacitated the eighth juror. The court held that the defendant, having agreed to proceed when such agreement was not mandatory, must be so bound by the verdict.[39] Such conviction amounts to a majority verdict. It should be noted that such consent is void in Mississippi.[40]

Florida has chosen in two recent cases[41] to use *Duncan* in support of its refusal to extend the common law jury traditions to her state actions: "The guarantee of an impartial jury trial, but not a guaranteed number of jurors to participate at the trial is provided by the Sixth Amendment."[42]

Mississippi, in company with more than half of her sister states, has extended the majority verdict to civil actions,[43] but, as in the case of the number needed to comprise a criminal jury, the state has been silent on the question of criminal unanimity. Apparently the question has been considered only once in the 1950 case of *Markham v. State.*[44] Holding that it was not improper to instruct the jury that their verdict must be unanimous, the court stated:

> In 31 Am.Jur. p. 556, Jury, Sec. 7, it is said: "The constitutional right to trial by jury includes as its essential elements

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[37] State v. Gann, 254 Ore. 549, 463 P.2d 570, 572 (1969).

[38] Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417, 428 (1968).

[39] State v. Heemer, 25 Utah 2d 69, 475 P.2d 1008 (1970).

[40] Scott v. State, 70 Miss. 247, 11 So. 657 (1892).

[41] Hearns v. State, 223 So. 2d 738 (Fla. 1969), *cert. denied,* 399 U.S. 929 (1970); Morgan v. State, 223 So. 2d 801 (Fla. Dist. Ct. App. 1969), *cert. denied,* 399 U.S. 933 (1970).

[42] Hearns v. State, 223 So. 2d 738, 739 (Fla. 1969).

[43] MISS. CONST. art. 3, § 31 provides that:

> The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Ulmer v. Pistile, 115 Miss. 485, 76 So. 522 (1917).

[44] 209 Miss. 135, 46 So. 2d 88 (1950).

> that the jury shall consist of twelve impartial men, neither more nor less, * * * and that the verdict shall be unanimous." In 53 Am.Jur. p. 595, Trial, Sec. 804, it is said: "In a criminal prosecution in which a unanimous verdict is required, the defendant is entitled to an instruction as to the unanimity of a verdict of guilty."[45]

Because the lower court had refused to allow the instruction, the supreme court reversed and remanded the case for a new trial.

Mississippi is in the same position concerning the majority criminal verdict as that outlined for the twelve-man jury. It appears that thought has not been given recently to whether the criminal jury as it now exists in the state adequately meets the needs of the citizenry.

III. COMMENTS ON THE MODERN JURY

There are several areas of the jury procedure which are proving to be of some concern to contemporary students in the fields of jurisprudence and sociology. It has been estimated, after considerable research, that a bench trial is usually 40 per cent less time-consuming than a jury trial.[46] "It is the jury system that entails the bulk of the costs to both states and litigants" and it "is the jury system with its numerous hung juries that causes so many mistrials."[47] Arguing for a reduction in the number of jurors needed for a jury panel, one would-be innovator argues:

> Even without a statistical analysis, one can conclude that such a change would result in (a) less court time spent on impaneling juries, especially in highly publicized cases, (b) less state money spent on jury related expenses, and (c) less court congestion with resulting speedier trials.[48]

More than one writer urges that serious attention be given to the role of the personality and background of the juror in his individual deliberation and to the interaction of these factors relating to all jurors in their communal deliberations.[49] Some authors point out that while the purpose of the common law jury was to provide a representative sampling of the community in which the defendant resided in order to protect him from the arbitary process of determining guilt before the institution of the jury system, such is not the case today. While it is readily apparent that a defendant in a large city will find himself unacquainted with those who sit in judgment, it is perhaps more significant that he will generally find that his jurors represent only certain classes of people. It is suggested that juries will be heavily weighted with the unemployed, farmers (except during planting and harvesting time), retired people, and housewives (especially those whose children are grown or in school),[50] since many other groups are unable to leave their jobs. Thus, professional and technical workers, managers, officials, and proprietors are more likely to be significantly under-represented on juries,[51] as will lawyers, doctors, and ex-convicts, who are frequently exempt by statute from serving. People with occupations commanding a high degree of status are more likely to be chosen as foremen, and interestingly enough will tend to sit toward the head of the jury table.[52] Further, there tends to be a greater degree of influence exerted on the deliberations by those with high school educations than those with grade school or college educations and by businessmen and skilled laborers than those of other occupations, particularly unskilled laborers and housewives.[53] National origin and race play a certain role in an individual juror's deliberation; those from some countries tend to favor the idea of established law and government, while those of some races will tend significantly to vote not guilty by reason of insanity.[54] Age may play a vital role; older people tend to be more politically conservative and less tolerant of non-conformity.[55] Wealth may predispose a man toward the death penalty, while his sex alone may render him more sympathetic to certain types of criminal offenses.[56]

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[45] *Id.* at 137-38, 46 So. 2d at 89.

[46] H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT 81 (1959).

[47] McWhorter, *Abolish the Jury,* 57 AM. L. REV. 42, 45 (1923).

[48] Moss, *The Twelve Member Jury in Massachusetts—Can It Be Reduced?,* 56 MASS. L.Q. 65, 66 (1971). Mr. Moss states: "In Commonwealth v. French, 1970 Mass. Adv. Sh. 619 (the Teddy Deegan murder trial) it took twenty-two days of examining 1,183 veniremen to reach a jury of sixteen." *Id.* at 76 n.5. Such statistics are generally difficult to find, but Mr. Moss' cited case indicates to what point the judicial process and pocketbook are stretched in cases of notoriety—of which cases Mississippi has had her share.

[49] H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966) (hereafter cited as KALVEN & ZEISEL); R. SIMON, THE JURY AND DEFENSE OF INSANITY (1967) (hereinafter cited

It is clear to some researchers that juries address themselves to more than the facts presented in court and allow themselves to be swayed by sentiments which fall outside the scope judicial rules. When judge and jury disagree, it is proposed that fifty-four percent of such disagreements

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as SIMON); Erlanger, *Jury Research in America,* 4 L. & SOC'Y REV. 345 (1970) (hereinafter cited as Erlanger); Simon, *Status and Competence of Jurors,* 64 AM. J. SOC. 563 (1958); Note, *Personality Tests for Prespective Jurors,* 56 KY. L.J. 832 (1967).

[50] J. BRENNAN, THE COST OF THE JUDICIAL SYSTEM 59 (1966).

[51] Erlanger at 352.

[52] *Id.* at 353.

[53] SIMON at 117.

[54] *Id.* at 111.

[55] *Id.*

[56] Erlanger at 353.

are attributable to "issues of evidence," twenty-nine per cent to sentiments about the law in issue, and eleven per cent to sentiments concerning the defendant.[57] Sympathy on the part of the jury is somewhat dependent upon the attractiveness of the defendant.[58] While a judge generally understands the case better than the jury, women understand testimony better than men, who in turn play a more active role in the verbal deliberations.[59] In the twenty-five per cent occurrence of disagreement between the judge and the jury, it is the tendency of the jury to favor leniency.[60] Jurors have an "expanded" view of what constitutes self-defense, find themselves not in sympathy with certain types of offenses such as violations of liquor and gambling laws, and favor leniency when the defendant has been punished "enough" by such things as an injury while committing the crime or severe family misfortune.[61] Generally, juries favor prosecution of narcotics offenses, child neglect, and some types of sexual offenses and disagree with the judge who would tend to favor reduction of the charge when the evidence is not strong.[62] It has been long recognized that the attorney may play a major role in arousing sympathy or hostility toward his client; he may unwittingly alienate the jury through his voir dire and courtroom behavior.[63] Further, one juror may submit to "coalition pressure," when upon open vote he finds himself dissenting with the overwhelming majority, and change his vote to agree with theirs.[64] Some argue that if the jury system is to continue as it is, the judge should be allowed far greater latitude in commenting upon the evidence and in aiding the jury in determining matters of fact.[65]

In support of the majority verdict, Justice Denecke wrote:

> The most plausible argument in support of the unanimity requirement is to the effect that, since one can be convicted only upon being found guilty beyond a reasonable doubt, a non-unanimous jury verdict cannot result in conviction because the disagreement with a guilty verdict by one or two of the twelve jurors is sufficient to establish that there is reasonable doubt as to the guilt of the defendant.[66]

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[57] Kalven & Zeisel at 115.
[58] *Id.* at 214-218.
[59] Erlanger at 347.
[60] Kalven & Zeisel at 66-76.
[61] *Id.* at 164-165.
[62] Simon at 145-147.
[63] Erlanger at 348.
[64] Comment, *On Instructing Deadlocked Juries,* 78 Yale L.J. 100 (1968).
[65] Suderland, *The Inefficiency of the American Jury,* 13 Mich. L. Rev. 302 (1915).
[66] State v. Gann, 254 Ore. 549, 463 P.2d 570, 575 (1969).

Respectfully declining to adopt that view, the Judge attributes the dissent to a failure of the dissenting jurors to "correctly understand the evidence or the court's instruction" or to "some extraneous cause having no relation to the quantum of proof."[67] Further:

> Proof beyond a reasonable doubt is not like a physical or chemical property the presence of which can be objectively ascertained. Unless the absence of proof is so conspicuous that a judge can hold "as a matter of law" that proof beyond a reasonable doubt has not been established, there is no test to determine whether such a degree of proof has been adduced. It does not appear that the nonconcurrence of one or two jurors signals such a defect.[68]

Sir Patrick Devlin speaking of the unanimity requirements said:

> The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are most invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes whould be rejected as impracticable? The answer is that no one ever planned that it should be that way; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous; when the twelve witnesses were translated into judges, the unanimity rule, notwithstanding that its original significance had then departed, remained with them. . . .[69]

IV. CONCLUSION

The total concept of the criminal trial is based on the supreme right of the accused to be adjudged innocent until *proven* guilty, that unalienable right promulgated by the forebears of this democratic nation, guaranteed as a civil liberty sacrosanct to all. Any modification that would in the very least diminish or jeopardize that right is be totally unacceptable; the zealous protection of that right is of first import.

The accused is promised a fair and impartial trial by a jury of his peers. The status of the *peer* jury may be in a state of change and still deserves thoughtful consideration in order to insure fair representation (despite recent progress in including as jurors those from all races, creeds, national origin and sexes).

The element of impartiality is not difficult to insure in terms of the six-man jury and the non-unanimous verdict, for surely six men would be no more impartial than fifty men nor less impartial than one. How can one argue that ten men out of twelve would be less impartial than twelve men out of twelve?

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[67] *Id.*

[68] *Id.* at 575-76.

[69] P. DEVLIN, Trial By Jury 48 (1956).

Fairness provides greater scope for argument from all directions. Most courts say that some number less than twelve are capable of rendering a fair verdict in civil cases; most courts hold that only twelve may render justice in criminal trials. Could not fairness reach its ultimate degree with only six men or through a non-unanimous verdict? Neither complex mathematical equations nor lengthy philosophical discussions can ever provide the answer in absolute.

But consider the victim of criminal assault when the agony is doubled by a hung jury necessitating a re-trial; consider the accused in the same position. Many say that the six man jury would exactly halve all those expenses which are jury related. Might not that same sum be better spent in rehabilitation within prisons? The non-unanimous verdict would have a greatly liberating effect on the now cumbersome and overly emphasized process of the *voir dire* examination and lend to better purpose those many hours saved.

The sad social waste of the hung jury would be virtually eliminated by institution of a non-unanimous verdict. The problems of retrial are obvious, and one must further consider whether the retrial does not consistently tend to favor one side. To allow agreement by only eleven men would prevent hanging the jury by negating that twelfth juror who may have been bought, motivated improperly, or who is simply foolish or unreasonably stubborn.

The facts indicate that some reforms are required to achieve judicial efficiency and public protection. Experiments with jury system changes in other jurisdictions seem to show one successful method of such reform.

Ann Wynne Ball

STUDENT NOTES

VALID DEFENSES AGAINST A HOLDER IN DUE COURSE

"The most odious of all oppressions are those which mask as justice."[1]

I. Introduction

Throughout the United States people are being swindled out of their homes through deeds of trust which the victim unknowingly signs. The perpetrators of these schemes to defraud appear to be mainly in the home improvement industry, and the victims are "nearly always negroes of little education. . . ."[2] In one six month period in the District of Columbia alone, three home-improvement companies obtained over a quarter of a million dollars in illegal deeds of trust.[3] Very seldom was actual forgery involved, but in almost every case the home owner denied signing the deed of trust, even though his valid signature appeared on the document.[4] The success of these schemes is due to the use of legal channels for easy collection of the debt.[5]

In many of the schemes used to defraud the victim, the swindler has complied with the letter of the law in obtaining the deed of trust. The swindler then sells the paper to a third party, a holder in due course. Upon suit by the victims, courts have upheld the schemes and allowed collection on the paper because the facts presented them complied with the letter of the law, *i.e.,* the signature was valid. This has been true even when the scheme as a whole did not comply with the letter of the law, the signature having been obtained by fraud in the factum. The United States Supreme Court has said that "[e]quity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole."[6]

Dealing with such situations, the Mississippi Supreme Court has in the past concurred with the Supreme Court. In *Oliver v. Board of Supervisors*[7] the Supreme Court of Mississippi said, "Equity should and will look to the actual substance of a transaction rather than its mere form."[8] In *Bethea v. Mullins*[9] the appellant was tricked into signing a deed of trust. The Mississippi Supreme Court held that to uphold the deed of trust would "do violence to the equities of the case."[10] In *Lampley v. Pertuit*[11] the plaintiff obtained from the defendant four hundred dollars. At the trial the plaintiff claimed the transaction was a loan, while the defendant claimed it was a sale of the plaintiff's house and land. The house and land were valued at between $1650 and $2000 and had a rental value of $260 per year, the rent being over 5/8 of the alleged sale price. The court held that in this case equity would " ' lay hold of slight circumstances of oppression, fraud, or duress in order to rescind the conveyance ' " and that actual fraud need not be established " ' by the clear and convincing evidence ordinarily required. ' " [12]

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[1] Krulewitch v. United States, 336 U.S. 440, 458 (1949).

[2] W. MAGNUSON, THE DARK SIDE OF THE MARKETPLACE 41 (1968).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 42.

[6] United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944).

[7] 211 Miss. 447, 51 So. 2d 766 (1951).

[8] *Id.* at 457, 51 So. 2d at 769.

[9] 226 Miss. 795, 85 So. 2d 452 (1956).

Mississippi has enacted the Uniform Commercial Code since these decisions, but the Code has changed the substance of the law of commercial paper very little. In fact, ". . . .article 3 is a rewrite of the Uniform Negotiable Instruments Law, and of all of the articles of the Uniform Commercial Code, it makes fewer changes in the existing law than any other."[13] At the Twenty-Second Annual Mississippi Law Institute it was said that Article 3 might be called "[o]ld wine in new bottles."[14] Strangely, however, the Mississippi court recently decided a case which apparently abandons its former concern for equity.

II. *Fuller v. American Aluminum Corporation:*[15] a Mississippi Case

A. *The Facts.* Minnie Fuller brought suit in the Chancery Court of Lafayette County to reform a contract and set aside a deed of trust. Affirming the chancellor's refusal to grant relief, the Mississippi Supreme Court held that there are no defenses against a holder in due course. The facts as they appear in the complaint are as follows: Mrs. Fuller returned an inquiry card to American Aluminum Corporation, evidencing interest in having her home re-sided with aluminum siding for $199.00. A salesman for the company, Dick Greenwood, called on Mrs. Fuller on April 3, 1968. He informed her that a much better grade of siding was available for $295.00. (The company later claimed the price was $1295.00.) She then signed a contract for the $295.00 price. Later the same night Mrs. Fuller looked at her copy of the agreement and discovered that the price was $1295.00, " (t) he additional digit having been inserted either after she observed the contract and before she signed it, or after her signature was affixed thereto."[16] She then wrote the company that because of the fraud she considered the contract at an end. Approximately two weeks later Mrs. Fuller returned from work to find the siding installed on her house. At that time she signed a completion certificate. The company then sold a note for over $2,000.00 (the house and 1 acre of land were worth $900.00), covering the contract, and a deed of trust on Mrs. Fuller's house, dated April 15, 1968, to the United States Finance Company, Inc. Mrs. Fuller refused to make any payments, and the finance company started foreclosure proceedings. The trial court found against Mrs. Fuller. The supreme court, affirming the decision, stated:

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[10] *Id.* at 805, 85 So. 2d at 457.

[11] 199 So. 2d 452 (Miss. 1967).

[12] *Id.* at 455, citing Bethea v. Mullins, 226 Miss. 795, 804, 5 So. 2d 452, 456 (1956).

[13] Mitchell, *Commercial Paper,* in UNIFORM COMMERCIAL CODE 107 (M.L.I. 1967).

[14] *Id.*

[15] 249 So. 2d 410 (Miss. 1971).

[16] Record at 9-10.

> We are urged, therefore, to reverse and remand the case to the the trial court in order that recovery may be limited to *quantum meruit. This might be done were it not for the undisputed fact that the rights of the United States Finance Company intervened.*[17]

The court seems to be of the opinion that once there is a holder in due course, all defenses of the maker are voided as to that party. The tone of the court seems to be: "We are sorry, but there is nothing that we can do." Further on in its opinion the court stated:

> It is often difficult to protect persons against the consequences of *their own folly* in any case. It becomes impossible to do so where such folly has led to the interposition of rights of others who are innocent of wrongdoing, or at least, who are not shown to be guilty of wrongdoing. . . .*Appellant involved herself in what appears to have been a greviously improvident transaction.*[18]

Mrs. Fuller alleged that it was not her "own folly" but the fraud on the part of the agent that caused her problems. What she had agreed to was not "an improvident transaction;" the agent's fraud made it that.

Reading the opinion as a whole, it appears that the court has said that no matter what is done, once the note is negotiated to a holder in due course there are no defenses to it. Such is not the law in Mississippi either under the UCC or prior law.

B. *The Testimony.* In the instant case a look at the trial record reveals significant discrepancies in the testimony of Greenwood, the salesman. Apparently Greenwood was not at all sure just what did happen.

Mrs. Fuller testified that only one man came to sell her the siding. Greenwood testified that Tommy Adams accompanied him when he called on Mrs. Fuller. However, in the appellee's (American Aluminum Corp.) brief to the Mississippi Supreme Court it is stated that "(i)t should be remembered that at the time of the execution of the contract the only persons that were present were: Appellant, Minnie C. Fuller, and Dick Greenwood."[19] But the deed of trust was signed as witnessed by both Greenwood and Adams.

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[17] 249 So. 2d at 411 (emphasis added).

[18] *Id.* (emphasis added).

[19] Brief for Appellee at 5-6, Fuller v. American Aluminum Corp., 249 So. 2d 410 (Miss. 1971). Under Miss. Code Ann. § 858 (2) (1956), a notary public need not see the person sign his name in order to be able to notarize the signature. All that is necessary is that a third party swear before the notary that he, the third party, witnessed the signature, and the notary may notarize the document.

Not only is the testimony conflicting as to who was there, but it is also unclear as to when the note and deed of trust were signed: Mrs. Fuller testified that the only contact she had with the company after April 3, 1968, was with the two workmen who put on the siding. Greenwood testified that he did not see Mrs. Fuller after April 3, 1968, until the day of the trial. He also testified that the note and deed of trust were signed in his presence, on the 15th of April, 1968. Greenwood's testimony on this point was:

> Q. What did she sign?
> A. She signed the papers.
>
> Q. What papers?
> A. She signed the deed of trust, she signed the note, and she signed the contract.
>
> Q. Were all these completed or were they in blank?
> THE COURT: Let me get this straight. Were you there when she signed these other instruments?
> A. No.[20]

Mrs. Fuller stated that she was familiar with deeds of trust, because she had signed one for Gulf Finance Company. She stated that the only way she would have signed a deed of trust for Greenwood was if it were covered except for the signature line.

Although Greenwood had worked as a salesman for American Aluminum for about three years and had several years experience as a salesman prior to that, he testified that he had never read a deed of trust. He also testified that although he was the salesman involved in the sale to Mrs. Fuller, the writing filling in the blanks on the deed of trust and note was not his handwriting. Greenwood's testimony was:

> Q. Did you fill in the terms on the deed of trust?
> A. No, sir, I filled the contract itself.
>
> THE COURT: How did those terms get in the deed of trust then? That is what is puzzling me.
> A. Sir.
>
> THE COURT: How did those terms get in the deed of trust?
> A. I really don't know.[21]

Mrs. Fuller's house with one acre of land was worth $900.00 one month before Greenwood sold her the siding.[22] For this "somewhat dilapidated dwelling,"[23] Mrs. Fuller had agreed to pay over $2000.00 for siding and had put up her home and the one acre of land as security, according to the form of the instruments at the trial.

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[20] Record at 123-24.

[21] *Id.* at 131-32.

[22] *Id.* at 72-73.

[23] 249 So. 2d at 411.

The salesman, Dick Greenwood, was introduced as a direct witness by Mrs. Fuller. She tried to have him declared an adverse witness but failed in this effort. The Chancellor, commenting on Greenwood's status said:

> I would add this by way of observation, that I don't think . . . from my impression of the intelligence of this witness, whatever you want to call him, as an adverse or a direct witness is going to make a particle of difference in the world in his testimony.[24]

And in his opinion this same chancellor referred to Mrs. Fuller as "a person that appears to me to be rather intelligent, and I think that makes a difference in these kind[s] of cases."

C. *The Decision.* The chancellor found for the American Aluminum Corporation and the United States Finance Company against Mrs. Fuller. There was a clear contradiction between testimony of Mrs. Fuller and that of the salesman. In fact, Greenwood's testimony was not at all consistent; whereas Mrs. Fuller's testimony was very consistent. In order to reach the result of the chancellor, it must be assumed that he believed the contradictory testimony of Greenwood over Mrs. Fuller's consistent testimony. The chancellor's own comments on the credibility of the witnesses make it difficult to understand why he accepted the weaker of the two versions, and yet that appears to be the only way he could reach the result that he did.

The Mississippi Supreme Court reached the same result, though they apparently based their decision on the "fact that the rights of United States Finance Company have intervened;"[25] and upon the theory that

> [W]here one of two innocent persons must suffer a loss, it should fall on him who by reasonable diligence or care could have protected himself, rather than on him who could not.[26]

However, it was not her "own folly" that caused the loss, as can be seen from Mrs. Fuller's testimony. Mrs. Fuller was no more the author of her difficulties than is the subject of a forgery the author of the forged instrument. In the absence of negligence Mrs. Fuller should not have had to bear the burden of the loss just because a third party had intervened.

III. Defenses to a Holder in Due Course

A. *The distinction between a holder and a holder in due course.* In many swindling schemes the quality of the service or product is not what it is held out to be by the salesman; this failure of the product or service to meet the specifications given by the salesman may be a defense to an action on the contract by the selling company. To avoid this defense and to perfect the fraud, the company negotiates the note to an "innocent" holder in due course. Since the selling company was just a "holder" of the note, it was subject to the following defenses:

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[24] Record at 155.

[25] Fuller v. American Aluminum Corp., 249 So. 2d 410, 411 (Miss. 1971).

[26] Savings Bank v. Creswell, 100 U.S. 630, 643 (1879).

> a. All valid claims to it [the note] on the part of any person; and
> b. all defenses of any party which would be available in an action on a simple contract; and
> c. the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose . . . .; and
> d. the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement.[27]

If the buyer of the paper can meet certain requirements, (taking the instrument for value in good faith and without notice) he then becomes a holder in due course.[28]

This is a necessary part of the swindlers' scheme, because a holder in due course takes the instrument free from:

> 1. All claims to it [the instrument] on the part of any person; and
>
> 2. all defenses of any party to the instrument with whom the holder has not dealt except
> a. infancy . . . .; and
> b. such other incapacity. . .as renders the obligation. . .a nullity; and
> c. such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
> d. discharge in insolvency proceedings; and
> e. other discharge of which the holder has notice when he takes the instrument.[29]

It is readily apparent that almost all of the defenses available to the victim of the scheme have been cut out from under him by the simple act of selling the note. He can bring suit against the selling company if he can find it and if it will not cost him more than he can recover in damages. But if he does bring suit, he must prove the fraud. In any event the victim must pay the note. The victim is left holding the bag, which the courts will force him to fill.

Three defenses available against the holder in due course, however, are forgery, material alteration and fraud. Proof of these defenses is often dependent upon parol evidence.

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[27] Miss. Code Ann. § 41A:3-306 (Spec. UCC Supp. 1967).

[28] MISS. CODE ANN. § 41A:3-302 (Spec. UCC Supp. 1967).

[29] MISS. CODE ANN. § 41A:3-305 (Spec. UCC Supp. 1967).

The parol evidence rule does not prevent evidence as to fraud from being admitted.[30] From looking at the written document it may not be apparent whether there was fraud, mistake, duress, or anything else that may make the paper void or voidable. Hence on these issues no relevant evidence is excluded, and there is no parol evidence rule to apply.[31] In *Wren v. Hoffman*[32] the court stated that there is a qualification to the parol evidence rule that allows parol evidence to show that a contract never had any legal existence. The evidence goes not to vary the terms, but to the very existence of the contract itself.

B. *Forgery.* Generally a person is not liable for an instrument if he has not signed it. If he has not signed it, he has not shown a willingness to be bound.

> [T]he fundamental rule [is] that as to all persons, even a holder in due course, a forgery is a nullity, unless the person whose signature was forged is estopped from asserting that defense. . . .[33]

The recent California case of *Buck v. Superior Court*[34] stated:

> [T]he correct rule is that the procuring of a genuine signature to an instrument by fraudulent representations constitutes forgery is supported by these well reasoned authorities. Likewise the rule is established in California that alteration of a document without authority with the intent to defraud may constitute forgery and that such alteration may consist of the insertion of matter in the document in question after it has been signed.[35]

However, when the maker was aware of what he was signing but was misled as to the desirability of entering into the agreement or misunderstood the consideration involved, the courts have refused to call that forgery.[36]

In deciding whether or not to label an act forgery, one consideration has been the type of proceeding. Courts have been reluctant to call fraudulent representation or alteration fraud in the inducement forgery in criminal cases. But in civil cases the standard of what is forgery has been lowered, and such conduct has been held to constitute forgery.[37]

B. *Material Alteration.* Any change in an instrument which causes its legal effect to be different from what it was originally is a material alteration.[38] A change as small as the addition of one cent to the amount of the instrument is a material alteration.[39] However, a material alteration does not discharge any party unless it is made for a fraudulant purpose.[40] The alteration must be made by a holder of the instrument; if it is made by a stranger then it is called a "spoliation," and as long as the original agreement can be determined the spoliation has no effect.[41] Once an alteration has been made, its effect is determined by possession of the instrument. If it is held by a holder, the maker is discharged.[42] If the instrument is held by a holder in due course, he can enforce the instrument in its original form.[43]

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[30] Henry v. Rawleigh Co., 152 Miss. 320, 326, 120 So. 188, 189 (1929).

[31] 3 A. Corbin, CONTRACTS § 573 (1960).

[32] 41 Miss. 616 (1868).

[33] R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 3-305:37 (2d ed. 1971).

[34] 42 Cal. Rptr. 527 (Dist. Ct. App. 1965).

[35] *Id.*

[36] Annot., 11 ALR 3d 1074 (1967).

[37] *Id.* at 1080.

[38] Bridges v. Winters, 42 Miss. 135, 141 (1868).

Negligence of the maker estops him from denying the alteration. Considering what constitutes negligence, the Mississippi Supreme Court has held that a person need not act on the belief that a forgery will be committed just because someone is given the opportunity for it. "In no relation of life do men conduct their affairs as though crime will be committed whenever it may be."[44] It is not negligent "to do that which can injure no one unless someone else shall commit a felony."[45] A person who signs negotiable paper is only liable for the contract he has made and is free from other contracts even if they are written on the same paper, for another contract is no more his than a forgery.[46]

C. Fraud. The Mississippi Supreme Court has said that "fraud vitiates all things."[47] But just what is fraud? Speaking of fraud the Supreme Court of Oklahoma said:

> There is also the matter of the detestable nature of "fraud" in that it embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another.[48]

The courts have tried to avoid binding themselves to a narrow definition of fraud, fearing that some unscrupulous men would find a way to meet the letter of the definition and still take unfair advantage of his fellow man.[49]

However, fraud has been divided into two types. Fraud in the inducement is not a defense against a holder in due course.[50] Fraud in the inducement is made up of personal defenses which do not attack the instrument itself, but go to make the instrument viodable between the original parties.[51]

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[39] R. Anderson, Uniform Commercial Code § 3-407, Comment 1 (1962).

[40] Upton v. Bush, 141 Miss. 660, 667, 107 So. 284, 285 (1925).

[41] Francis v. Hughes, 217 Miss. 377, 380-381, 64 So. 2d 351, 352 (1953).

[42] Miss. Code Ann. § 41A:3-407 (Spec. UCC Supp. 1967).

[43] Miss. Code Ann. § 41A:3-407 (3) (Spec. UCC Supp. 1967).

[44] Simmons v. Atkinson & Lampton Co., 69 Miss. 862, 868-869, 12 So. 263, 264 (1892).

[45] *Id.*

[46] *Id.*

[47] Patton-Worsham Drug Co. v. Planters Mercantile Co., 86 Miss. 423, 426, 38 So. 209, 210 (1905).

[48] *In re* Adoption of Graves, 481 P.2d 136, 138 (Okla. Sup. Ct. 1971).

[49] White v. Union Producing Co., 140 F.2d 176, 178 (5th Cir. 1944) (Citing Mississippi cases).

[50] 2 R. Anderson, *supra* note 9, at § 3-305:31.

Real defenses, fraud in the factum, are good against a holder in due course.[52] Real defenses are listed in § 41A3-305 (2) (a-e) of the Miss. Code Ann. They are defenses that "render the obligations of the party a nullity."[53]

The Uniform Commercial Code has enlarged the concept of fraud in the factum to include an instrument signed with knowledge of its character, if knowledge of its essential terms is missing.[54] In order to claim a defense of fraud in the factum, the maker must be free of negligence in failing to ascertain the nature of what he was signing.[55]

In controversies involving fraud, a wide range of evidence is admissable, including other similar frauds by the same party, to show a general pattern and the intent of the party.[56] Both fraud and negligence are fact issues and are to be determined by a jury.[57]

D. Misrepresentation. "A person dealing with another may assume that the representations made by such other persons are true."[58] A seller may not escape responsibility for misrepresentations by stating that the purchaser could have discovered the falsity by investigation.[59]

Section 41A3-305 (2) (c) of the Mississippi Code deals with misrepresentation as a defense to a holder in due course. It recognizes real defenses, fraud in the factum, as effective against a holder in due course. The reasoning is that the signer would not have signed the instrument if he had known its true import and that he did not intend for his signature to bind him to the unknown terms. The test to be applied is that of excusable ignorance; the signer must be unaware of the true terms and not negligent in his ignorance. Age, sex, education, experience, ability to read, the trust in the party making the representations, the necessity for acting without delay are some relevant factors in determing negligence.[60]

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[51] G. WEBB, UNIFORM COMMERCIAL CODE HANDBOOK 194 (1968).

[52] Moore v. Southern Discount Co., 107 Ga. App. 868, 132 S.E.2d 101 (1963).

[53] *Id.* at 188.

[54] New Jersey Mortgage and Investment Co. v. Dorsey, 33 N.J. 448, 165 A.2d 297, 298 (1960).

[55] Coombs v. Wilson, 142 Miss. 502, 508, 107 So. 874, 875 (1926).

[56] Nash Miss. Valley Motor Co. v. Childress, 156 Miss. 157, 163, 125 So. 708, 709 (1930).

[57] Peeples v. Clark, 139 Miss. 47, 52, 103 So. 500, 501 (1925); Hall v. Box, 131 Miss. 218, 233, 94 So. 221, 223 (1922).

[58] Streater v. State, 180 Miss. 31, 41 177 So. 54 (1937).

[59] Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 163, 125 So. 708, 709 (1929).

[60] 2 R. ANDERSON, UNIFORM COMMERCIAL CODE, § 3-305, Comment 7 (1962).

IV. Conclusion

Senator Warren Magnuson, in his book on consumer fraud, states:

> The single factor most responsible for consumer injustices is the holder in due course doctrine. A New Jersey judge called it "the mask behind which fraud hides." Finance companies can work hand in hand with fraudulent operators, and unless it can be proved that the finance company is a knowing party it cannot be held responsible, and the consumer must pay the fraudulent debt regardless. As we have seen, many moneylenders do not even investigate the companies from whom they buy consumer paper. Some buy at such high discounts that it would seem apparent that something is amiss. All banks and finance companies have the option of buying such consumer contracts and notes with defenses or without. "With defenses" the lender can in turn sue the seller if the contract was induced through misrepresentations or fraud, but many lenders buy "without defenses" (no right to sue) because the paper is cheaper and because they know they are invulnerable under the law, making them an innocent third party.[61]

Although abolition of the holder in due course doctrine is one feasible solution of the problem of fraudulent sales practices, it is actually not necessary under the Uniform Commercial Code. Besides the specific sections of the code dealing with fraud and holder in due course, there are the "good faith" and the "unconscionable" contract sections which are broad and can be used by the courts to avoid enforcement of the legal part of an illegal scheme.

There are valid defenses to a holder in due course. The intervention of the rights of an innocent third party, even if a holder in due course, does not cut off all of the defenses available to the maker of an instrument. Mrs. Fuller claimed alteration, forgery, and fraud in the factum. Any one of which is a valid defense to a holder in due course if proved. Viewed with this in mind, the opinion of the Mississippi Supreme Court, with its intervention of rights and maker's folly, is wholly inadequate. If this opinion is followed, great injustice can result. Perhaps the failure to acknowledge that there are defenses to a holder in due course was an oversight on the part of the court. The court needs to correct the impression given by this decision.

The court has the means to prevent frauds from being enforced and to help eliminate them, but they must use the means available to them. At all events, the court should follow its own dicta and "lay hold of slight circumstances of oppression, fraud, or duress" to avoid unconscionable impositions on the poor, the ignorant, and the trusting and to avoid doing violence to the equities of the case in the name of the law.

Leo J. Stevenson

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[61] W. MAGNUSON, *supra* note 2, at 118-119.

ATTORNEY'S FEES

I. Introduction

The viability of the so-called American rule that each party litigant, in the absence of statute, must bear the burden of paying his own attorney's fees regardless of the outcome of litigation is tested periodically in Mississippi.[1] The same questions have also been raised by a number of legal commentators over a period of years.[2] The thrust of these questions involves a comparison of the equitable considerations of the general rule in England, allowing attorney's fees to be recovered by the successful litigant in legal or equitable actions as an item of cost,[3] with the practically unanimous American rule which allows the prevailing party to recover attorney's fees in only a few well defined circumstances.[4]

Arguments against the prevailing American rule have contended that "a legal system which refuses an innoncent party full compensation for expenses incurred in asserting his right necessarily denies him full redress for the injury he has suffered."[5] During the social revolution of the 1960's, economic discrimination was asserted as dictating change. Critics charged that "soaring legal fees have vitiated the impact of lowered financial risk and have excluded the poor [and increasingly the middle class] from active participation in the legal process."[6] Such exclusion was attributed in part to the inability of the successful litigant to recover attorney's fees, the major expense incurred in asserting his legal rights.

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[1] Bridges v. Land, 252 So. 2d 209 (Miss. 1971).

[2] *See* Cosway, *Attorney's Fees As An Element of Damages,* 15 U. CIN. L. REV. 313 (1941); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966); Goodhart, *Costs,* 38 YALE L.J. 849 (1929); Kuenzel, *The Attorney's Fee: Why Not A Cost Of Litigation?,* 49 IOWA L. REV. 75 (1963); Stoebuck, *Counsel Fees Included In Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966); Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.,* 38 U. CHI. L. REV. 316 (1971); Note, *Damages-Expenses of Litigation in Obtaining Dissolution of Injunction - Contingent Fee Arrangement,* 12 MISS. L.J. 515 (1940); Note, *Allowance of Counsel Fees Out Of a "Fund In Court": The New Jersey Experience,* 17 RUTGERS L. REV. 634 (1963); Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?,* 20 VAND. L. REV. 1216 (1967).

[3] Goodhart, *supra* note 2, at 856.

[4] Yazoo & M.V.R.R. v. Consumers Ice & Power Co., 109 Miss. 43, 67 So. 657 (1915).

[5] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?, supra* note 2, at 1216.

[6] Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., supra* note 2, at 316. For an intensive discussion of the poor and middle class with regard to legal representation *see* Carlin & Howard, *Legal Representation and Class Justice,* 12 U.C.L.A. L. REV. 381 (1964); Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, The Duty, and a Solution,* 26 U. PITT. L. REV. 811 (1965).

Mississippi has followed the majority of states with regard to the allowance of attorney's fees as a cost of trial or as a measure of damages. This note will examine the background of the American rule, the common exceptions to the rule found in Mississippi, and the advantages and disadvantages of the American rule as compared to the English rule.

II. Background of the American Rule

Long before the American colonies were populated the English law of cost, including the allowance of attorney's fees to the winning party litigant, was in existance.[7] Sometime before the American Revolution the English system of cost, along with most of our common law, was adopted in this country and has to a large extent been retained by the states.[8] During the early history of the country, however, the practice of allowing attorney's fees as an item of cost disappeared and was replaced by our present system which places upon each party litigant the burden of paying whatever attorney's fees he may incur in the litigation.

Why such an integral part of the system which provided the basic pattern for the legal system in this country disappeared is disputed. Professor Goodhart suggested that the low esteem in which lawyers were held during the Colonial period was the primary impetus leading to adoption of the present rule regarding allocation of attorney's fees. His reasoning in support of his admittedly tentative theory was:

> If lawyers were "characters of disrepute," it would hardly be reasonable to expect the law to encourage them by awarding cost to include counsel fees. It must be remembered that during this period a knowledge of the law was not felt to be an essential in the administration of justice. Many of the judges were laymen without experience in legal matters. The law, it was felt, was not a science but a body of rules which any intelligent man could understand. It would follow that for a litigant to employ a lawyer to present his case was to take a step which was not essential.[9]

Professor Kuenzel has reached the same conclusion with respect to the necessity of employing counsel in Colonial America; his reasoning however is quite different.

> [A]t the time our judicial system was established there was a wish to maintain a system of laws and procedures in which every man would be able to represent himself adequately before the courts. The idea that the successful litigant would be reimbursed for the expense of his attorney would appear im-

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[7] Goodhart, note 2 *supra* at 873. The allowance of attorney's fees as a portion of cost was a statutory development in English law. 2 F. Pollock & F. Maitland, The History of English Law 597 (2d Ed. 1898).

[8] C. McCormick, Damages 235 (1935) (hereinafter cited as McCormick).

[9] Goodhart, *supra* note 2, at 873.

proper as the litigant himself should have been able to succeed without this unnecessary assistance.[10]

Whatever their individual predilection as to a specific reason for the adoption of the American rule may be, most writers agree that the spirit and climate surrounding the development of judicial administration in this country favored the system which evolved.[11] Dean Pound, in his classic book, *The Spirit of the Common Law,* lists those factors having a fundamental bearing on the legal system which evolved in the United States as follows:

> (1) An original substratum of Germanic legal institutions and jural ideas; (2) the feudal law; (3) Puritanism; (4) the contest between courts and the crown in the seventeenth century; (5) eighteenth-century political ideas; (6) the conditions of pioneer or agricultural communities in America in the first half of the nineteenth century; and (7) the philosophical ideas with respect to justice, law and the state that prevailed in the formative period in which the English common law was made over for us by American courts.[12]

These factors interacted to produce within our embryonic legal system a "philosophy of intense individualism."[13] The legal system was viewed as a great forensic battlefield of individual rights, and the early American relied upon the same individual ability to achieve justice in the courtroom that enabled him to settle the frontier.[14] Dean Wigmore has described this peculiarly American legal phenomenon as "the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end" which "was fostered by the frontier attitude toward litigation."[15] The idea that each individual must bear the burdens, including all cost, incurred by litigation is inherent in the "sporting justice" theory.[16]

III. Exceptions to the General Rule

As with most other general rules of law, the courts have developed certain exceptions to the rule that a winning party litigant cannot, as an item of cost or element of damages, recover the expense of retaining counsel. Congress and the legislatures of several states have been moved to provide that the losing party in certain cases shall bear the burden of paying the winner's attorney's fees in addition to those costs normally provided.

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[10] Kuenzel, *supra* note 2, at 81. Professor Ehrenzweig, however, attributes the difference in rules to historical accident. State legislatures limited the amount of attorney's fees which could be recovered, and lawyers and the courts, over a period of time, forgot the real purpose and meaning of the amounts allowed Ehrenzweig, *supra* note 2, at 798-99.

[11] Articles cited note 2 *supra.*

[12] R. POUND, THE SPIRIT OF THE COMMON LAW 14-15 (1921).

[13] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?, supra* note 2, at 1220.

[14] *Id.*

[15] R. POUND, *supra* note 12, at 127.

[16] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?, supra* note 2, at 1220.

For example, it is almost universally accepted that a party who has created, increased, or protected a common fund or estate which is before the court will be allowed reimbursement by the court for his reasonable attorney's fee. This rule was adopted by the United States Supreme Court in *Trustees v. Greenough*.[17] Defendants were trustees of a fund which was to secure the interest on certain bonds of a railroad company. Plaintiff, a bondholder, brought an action alleging waste against the trustees and sought to have a receiver appointed to protect the funds for the plaintiff and other bondholders. The trial court allowed the plaintiff's attorney's fees as a charge against the fund, and the Supreme Court affirmed, saying:

> [To deny attorney's fees] would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He [plaintiff] has worked for them as well as himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.[18]

Although the losing party was not required to pay the successful plaintiff's attorney's fees, the case is indicative of the inherent equity power of the courts to allow attorney's fees. Mississippi has provided by statute that attorney's fees may be paid out of a fund before the court in certain cases.[19]

In most states a wife prosecuting or defending an action for divorce or separation is entitled to have her husband pay for the reasonable counsel fee which she incurs.[20] This exception is predicated on policy considerations and legislative pronouncements that it is the duty of a husband to support his wife.[21]

Another common exception to the general rule allows all expenses, including attorney's fees, to one who has been caused to prosecute or defend an action because of the fraud or actionable misconduct of another.[22] Attorney's fees have also been allowed when the litigation was clearly vexatious and in bad faith.[23] These cases, however, have been rare, and the courts appear reluctant to use their inherent equity power even in the bad faith prosecution cases. This reluctance may be attributable in part to the same policy considerations which some contend are in part responsible for the retention of the American rule on attorney's fees, *i.e.*, "the principal of free access to the courts demands that all must be allowed to assert their claims without fear of penalty more severe than simple defeat."[24]

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[17] 105 U.S. 527 (1881).

[18] *Id.* at 532.

[19] MISS. CODE ANN. § 523 (1956) (compensation of temporary administrator; MISS. CODE ANN. § 633 (1956) (allowance of reasonable attorney's fee incurred by administrator, executor, or guardian); MISS. CODE ANN. § 1309 (1956) (compensation of guardian *ad litem*); MISS. CODE ANN. § 1363 (1956) (compensation of receiver appointed by court); *See also,* MCCORMICK 237-239; Annot., 49 A.L.R. 1149 (1927).

[20] *See, e.g.,* Nix v. Nix, 253 Miss. 565, 176 So. 2d 297 (1965); Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300 (1960); Thames v. Thames, 233 Miss. 24, 100 So. 2d 868 (1958).

[21] Blount v. Blount, 231 Miss. 398, 436, 97 So. 2d 240 (1957); Parker v. Parker, 71 Miss. 164, 14 So. 459 (1893).

The most common exception to the general rule is that which allows the parties to contract that the losing party will pay all expenses of litigation, including attorney's fees.[25] In certain cases complainants are required to post bond which, if they are unsuccessful in prosecuting the litigation, may be made to stand for the defendant's expenses, including attorney's fees, which result by reason of the action.[26]

While it appears settled that complainants in injunction cases may be liable for a defendant's attorney's fees, the converse is not true. In *Feld v. Young Men's Hebrew Ass'n*,[27] the plaintiff was successful in gaining a permanent injunction in chancery court. On appeal the plaintiff cross-appealed, contending that it was entitled to recover damages by way of attorney's fees.[28] The court refused to consider the question of whether a complainant in an injunction suit is ever entitled to recover attorney's fees and affirmed the chancellor's action denying the same, because "the only hearing on this cause was a full trial upon the merits."[29] Typically, as in most cases concerning questions about the allowance of attorney's fees, the decision was rendered without further reason.

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[22] Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871 (1950) (husband's duty to support wife continues throughout relationship).

[23] *See, e.g.*, McCORMICK 246-252; RESTATEMENT OF TORTS § 671 (b) (1938); RESTATEMENT OF CONTRACTS § 334 (1932); Annot., 45 A.L.R.2d 1183 (1956); *Cf.* Gandy v. Palmer, 251 Miss. 398, 169 So. 2d 819 (1964), holding that damages in a malicious prosecution case may be recovered for "(a) the harm to his [the plaintiff's] reputation which normally results from such an accusation as that brought against him, and (b) the distress which normally results from the initiation of such proceedings." *Id.* at 416, 169 So. 2d 827.

[24] Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1929).

[25] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?, supra* note 2, at 1227.

[26] *See, e.g.*, McInnis v. Southeastern Automatic Sprinkler Co., 233 So. 2d 219, 221 (Miss. 1970); Faulkner Concrete Pipe Co. v. United States Fidelity & Guar. Co., 218 So. 2d 1,3 (Miss. 1968); National Sur. Co. v. Trustees of Runnelstown Consol. School, 146 Miss. 277, 284-85, 111 So. 445, 448 (1927); MISS. CODE ANN. § 1336 (1956) (bond required before injunction will issue to stay proceedings at law); MISS. CODE ANN. § 1337 (1956) (bond required before injunction will issue to stay proceedings other than at law); McCORMICK at 253; *Cf.* MISS. CODE ANN. § 1330 (1956). Although the complainant is required to post bond before a writ of sequestration will issue, it has been held that the bond does not secure attorney's fees and other expenses incident to the case in which the writ is obtained. Stauffer v. Garrison, 61 Miss. 67 (1883).

[27] 208 Miss. 451, 44 So. 2d 538 (1950).

[28] *Id.* at 459, 44 So. 2d at 540.

Attorney's fees as a measure of damages have been allowed in certain cases. The Mississippi Supreme Court has stated that "[i]t is the rule in Mississippi that attorney's fees can be awarded in cases in which exemplary damages are given."[30] No satisfactory explanation has been given by the court as to the reason why attorney's fees may be considered an element of punitive damages but may not be awarded or even considered as a part of compensatory damages. Based on the theory that it is not the function of chancery courts to award punitive damages, the court has held that attorney's fees are never a proper measure of damages in chancery court unless specific statutory authorization exists.[31]

IV. Criticism of the American Rule

Just as they have been consistent in declaring that they will follow the American rule regarding allocation of attorney's fees, the courts have been almost uniformly consistent in failing to give reasons for their steadfastness.[32] An examination of some reasons advanced by the courts may shed light on their tendency to state the rule as law and dispense with any attempt at justification.

> (1) Attorney's fees are too remote to be considered in determining the damages to be awarded. (2) Compensatory damages are fixed to reward the injured person to the extent of the actual harm done by the defendant's wrongful act. Attorney's fees are not directly caused to be expended by the wrongful act of the party at fault. (3) The attorney's fees accrue after the declaration has been filed, and are not a part of the cause of action stated. (4) The party, having been allowed taxable cost, has been awarded all damages to which he is entitled. (5) There is no adequate way to determine the proper attorney's fees in a given case. (6) A successful plaintiff will be placed at a distinct advantage, if he is permitted to recover his attorney's fees, because the defendant will in any case be limited to statutory cost

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[29] *Id.*, 44 So. 2d at 541.

[30] Yazoo & M.V.R.R. v. Consumers Ice & Power Co., 109 Miss. 43, 67 So. 657 (1915).

[31] Bridges v. Land, 252 So. 2d 209 (Miss. 1971); Brent v. Cox, 246 So. 2d 552 (Miss. 1971); Capital Elec. Power Ass'n v. McGuffee, 226 Miss. 227, 83 So. 2d 837 (1955). A possible exception may exist in the case of slander of title actions. During the same term of court in which *Bridges* was decided, a chancellor's award of $1500 "compensable" damages based on "the testimony of an attorney that a reasonable attorney's fee for bringing the suit was $1400" was upheld. Phelps v. Clinkscales, 247 So. 2d 819 (Miss. 1971).

[32] *See, e.g.,* Yazoo & M.V.R.R. v. Consumers Ice & Power Co., 109 Miss. 43, 67 So. 657 (1915).

> only. (7) Adherence to a principle of requiring the unsuccessful party to pay his opponent's attorney's fees will stimulate increased charges by attorneys. (8) The relation between attorney and client, an important fiduciary relationship, will be threatened if the attorney is required to look to a third person for his compensation. (9) Placing the added risk of loss upon a person will tend to discharge the litigation of claims.[33]

It is evident that justification would be difficult, if the foregoing and similar reasons were the sole basis for continuing the rule. There is, however, another reason previously mentioned that presents the critic with some difficulty. Wigmore's "sporting theory of justice"[34] has become so deeply ingrained in the legal structure of our society that some have considered it to be a part of the constitutional concept of due process.[35] The substance of the due process argument is that "an individual has an inalienable right of free access to the courts, which access is not to be blocked by the fear of having to pay an opponent's fees."[36] Criticism of the due process violation argument is twofold.

> (1) This assertion is premised upon the belief that the fear of paying the fees of another would deter a man from the courts. Such a view assumes that our judicial decisions are more often wrong than right. . . . (2) Such a conclusion is equally applicable to the present rule, since its operation discourages just claims by those who cannot expect to recover more than the expense to litigate.[37]

Advocates of adopting the English system of assessing attorney's fees as court cost to the losing party have proffered two major theses in support of their position. Taxing reasonable attorney's fees as cost to the losing party will relieve the familiar congestion which characterizes our present court system.[38] Secondly, a remedy will be provided in those cases in which a theoretical right presently exists, but vindication is denied because the injured party must bear the expense of litigation.[39]

It has been suggested that the present system in which each party bears the expense of litigation has played a dominant role leading to congestion of court calendars across the country. Under the present cost system a plaintiff may use the court as an ally in financial extortion by bringing a groundless claim in hope that the defendant will prefer to make a settlement which would cost less than the expense of litigating.[40] On the other hand, a defendant may delay and obstruct action in the trial and appellate courts, regardless of merit, in hope that the economic pressure on the plaintiff will result in a settlement less than the amount of judgment.[41] In addition there exists in the foregoing examples an ethical dilemma for the attorneys involved; the dilemma presents problems difficult, if not impossible, to resolve.[42]

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[33] Cosway, *supra* note 2, at 314.

[34] R. POUND, *supra* note 12, at 127.

[35] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?, supra* note 2, at 1225.

[36] *Id.*

[37] *Id.* at 1225-26.

[38] *Kuenzel, supra* note 2, at 80.

[39] *Id.* at 85.

[40] *Id.* at 78.

Including the attorney's fees as an item of cost should reverse the financial leverage under the present system. A plaintiff faced with the possibility of paying his opponent's attorney's fees in addition to his own would think twice before he litigates a doubtful claim. The defendant would also have to consider the financial risk of defending an action or prosecuting an appeal in a case which should not be appealed.[43]

Perhaps the most important criticism of the American rule is that it permits rights to exist without effective remedies. While it purports to make the courts open to all who have a legitimate grievance against another, the rule effectively restricts the use of the courts to those who have the financial ability to retain counsel regardless of the rightness of their cause. The law should seek to make whole a party who has been wronged. Unless an exception exists that covers the particular circumstances, however, our present system dictates that complete relief be denied since attorney's fees are not recoverable as an item of damages.

V. The English Rule and Statutory Reform

Although justification of the American rule is difficult in view of the logic on which it purports to stand, an absolute rule providing that the losing party pay all attorney's fees could result in nearly the same inequities inherent under the present system. Valid criticisms have been voiced against wholesale adoption of the English system of awarding cost in this country. The more important criticisms are:

> (1) a litigant may be ruined if not successful; (2) justice is not completely black and white, and it is difficult to say that all rights are on the side of the winning party; (3) due to the great technicalities of our system, it is possible for a party with all the merits to lose; (4) risk of losing may well deter any doubtful litigant from asserting his rights.[44]

To meet the criticisms of the English rule as applied to the system of justice in this country and cure the inequities of the American rule, it will be necessary to draft legislation which recognizes these faults and provides a viable alternative. At least one proposed model statute provides that attorney's fees be awarded to the prevailing party on a reasonable basis.[45] Whatever method is employed for determining the amount of the attorney's fees to be awarded, it should be mandatory for the trial judge, with certain exceptions, to award attorney's fees as an item of cost. Unless mandatory, it is reasonable to conclude that most "judges would be reluctant to depart from the traditional way of assessing cost."[46] It should be within the discretion of the trial judge to make exceptions in those cases in which the award of attorney's fees would result in an injustice to one party or the other.

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[41] *Id.*

[42] *Id.* at 79.

[43] *Id.*

[44] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?*, *supra* note 2, at 1231.

[45] Stoebuck, *supra* note 2.

VI. Conclusion

The American rule requiring each party litigant to assume the burden of his own attorney's fees, regardless of his success or the rightness of his cause, will never allow complete justice and compensation for wronged parties, whether they be plaintiff or defendant. Depending on the financial resources of the individual litigant, the present system operates to discourage litigation of otherwise justified claims and promote litigation of groundless claims. Litigation becomes more a matter of money than right. Careful consideration should be given to the present inequitable situation by the bar, the courts, and the legislature, and a remedy consummate with the ideals of justice and equality should be provided.

Legislation will be necessary. The Mississippi Supreme Court has indicated that any change in the present rules concerning allocation of attorney's fees is a matter for the legislature. Until the legislature is made aware of the present inequities, the American rule will continue to work the same injustice that has characterized its history over the past two hundred years. Great care should be taken, however, in enacting legislation changing the present rule. One set of inequities must not be exchanged for another.

Ralph Rood

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[46] Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?*, *supra* note 2, at 1232.

CHILD CUSTODY — REBUTTING THE PRESUMPTION OF PARENTAL PREFERENCE

I. Introduction

The law governing child custody is very poorly defined in spite of the fact that decisions of custody will likely affect the child throughout life. Courts have tended to follow two basic rules in deciding child custody disputes. One of these, the parental preference rule, creates a presumption that the natural parent is preferred over strangers.[1] The other rule is the so-called "interest of the child" rule, which simply states that custody should lie where the best interest of the child will be served.[2] The rules are merely guides; their limitations are readily apparent. When the natural parent can and will provide a better environment for the child, either rule will produce the same result, but often the two rules will conflict.

Some courts have gone one step further by creating a rebuttable presumption that a child's best interest will be served by awarding custody to the parent.[3] In close cases in such a jurisdiction the parent will retain custody rather than a stranger.[4] This presumption has applied for many years in Mississippi.[5]

In *Nickle v. Burnett*[6] the child whose custody was in issue was nine years of age and had been in the custody of his grandparents and aunt, appellee in the case, since he was less than one year old. The child's mother was deceased, and only after the death of the child's grandparents did the father seek custody of his child. The chancellor found that the parent had not abandoned the child and was not an unfit parent. Nevertheless, the chancellor decreed that custody should remain with the appellee due to the ties of affection between her and the child. Reversing the chancellor and awarding custody to the father, the supreme court stated:

> We think, as against all save the mother, the father has the supreme right to the control and custody of his child unless he has forfeited this right by immoral conduct, or by an abandon-

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[1] Goldstein, *Psychoanalysis and Jurisprudence,* 77 YALE L.J. 1053, 1073-74 (1967-68).

[2] *Id.*

[3] Note, *Alternatives to "Parential Right" in Child Custody Disputes Involving Third Parties,* 73 YALE L.J. 151, 155 (1963-64).

[4] "Stranger" is used here to denote anyone other than the child's biological parent even though the child may have been in the custody of the so-called "stranger" for many years. In fact, the child may not have been in the custody of his biological parent at all.

[5] Newman v. Sample, 205 So. 2d 650 (Miss. 1968); Reynolds v. Davidow, 200 Miss. 480, 27 So. 2d 691 (1946); Stegall v. Stegall, 151 Miss. 875, 119 So. 802 (1929); Nickle v. Burnett, 122 Miss. 56, 84 So. 138 (1920); Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900).

[6] 122 Miss. 56, 84 So. 138 (1920).

> ment of the child, and that the mere fact that the affections of other people have attached to and grown for the child, and that they may have had temporary custody of it, under circumstances not amounting to abandonment on the part of the parent, does not warrant the court in depriving the parent of his child or children.[7]

In *Stegall v. Stegall*,[8] decided in 1929, the court awarded custody to the mother over the child's paternal grandparents, even though the mother had been indicted for the murder of the child's father. She also had a reputation for loose virtue. The court found that the evidence of unfitness was insufficient to deny her custody, since it was based exclusively on her reputation; the disposition of the murder indictment was not shown. Several other factors have been held insufficient to rebut the parental preference presumption. The fact that the person seeking custody can offer the child a socio-economic advantage has been held inadequate.[9] Other cases have held that the fact that little or no support has been rendered, coupled with the fact that a defendant relative has maintained custody of a child for several years, is not sufficient to overthrow the presumption.[10]

In Mississippi the burden of rebutting the presumption was defined by the supreme court in *Hibbette v. Baines*.[11]

> [The relative seeking custody] has the burden of showing clearly that the father is an unsuitable person to have the custody of his child; or that, however moral a man he may be, he had abandoned his child, contributing nothing to its support, taking no interest in it, and permitting it to remain continuously in the custody of others, substituting such others in his own place so that they stand in *loco parentis* to the child, and continuing this condition of affairs for so long a time that the affections of the child and of the foster parents have become mutually engaged to the extent that a severance of this relationship would surely result in destroying the best interest of the child.[12]

The rule was restated in *McAdams v. McFerron*[13] in 1938. The court held that the presumption that the best interest of the child is served by vesting custody in the father rather than a collateral relative is overthrown by a showing that the father is unfit to obtain custody or has abandoned the child. The court said:

> Such conduct [abandonment] conclusively rebuts and overthrows the legal presumption that the welfare of the child would, other things being equal, be best served by the custody

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[7] *Id.* at 66, 84 So. at 140.

[8] 151 Miss. 875, 119 So. 802 (1929).

[9] Reynolds v. Davidow, 200 Miss. 480, 27 So. 2d 691 (1946).

[10] Kees v. Fallen, 207 So. 2d 92 (Miss. 1968); Newman v. Sample, 205 So. 2d 650 (Miss. 1968).

[11] 78 Miss. 695, 29 So. 80 (1900).

[12] *Id.* at 721, 29 So. at 81.

[13] 180 Miss. 644, 178 So. 333 (1938).

> and control of the parent. Having once deserted the child there is no guaranty that such a parent might not in the future be guilty of some equally atrocious conduct toward it.[14]

One case which denied custody to the father without a finding of unfitness or abandonment is *Drew v. Drew*.[15] The decision was based on the fact that the father planned to leave the children with his sister and her husband but failed to show they were willing to provide for the children. The court further pointed out that the children would then be outside of its jurisdiction, leaving the chancellor powerless to rectify any error.[16]

The *Drew* case illustrates that the Mississippi court, while generally upholding a parental preference presumption, still looks to the best interest of the child in awarding custody. *Drew* represents the farthest extension of the best interest of the child rule. Until 1971 these rules appeared to state the Mississippi law of child custody.

II. The New Rule: *Thompson v. Foster*

In *Thompson v. Foster*[17] the court affirmed a modification of a child custody decree wherein the petitioner, father of a seven year old child, was granted custody although three years previously he had been found by the same chancellor to have abandoned his child. In the 1966 decree the child's legal custody was given to Mrs. Thompson, his maternal grandmother, with whom he had lived his entire life. The child's mother lived in the home of appellant until she died during the first year of the child's life. There was no evidence that the grandmother was unfit to maintain custody of the child, but merely a finding of fact that appellant was becoming older and might not be able to control a male child during his adolescent years. The other finding of fact was that the child's father, petitioner, had reformed and mended his evil ways to such an extent that he was then a fit and proper person to obtain custody of his child.

To the fact that the grandmother's age operated against her interest in retaining custody of the child, it can only be said that three years earlier the same chancellor did not allow the grandmother's age to prevent her from having the child's custody. Even though the grandmother was younger at the time of the first decree, the chancellor certainly considered that the grandmother would age as the child did.

The second issue in *Thompson* involves the modification of a custody decree based upon a change in circumstances. It is a well recognized fact in Mississippi that decrees of the chancery court may be modified on a proper showing of changed circumstances.[18] Although the previous decree is not res judicata, a *substantial* showing of changes which will affect the interest of the child should be required before the previous decree is disturbed.[19] To require less creates a possibility of instability in the child's environment and a possibility that the custodian will be forced to defend his custody repeatedly.

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[14] McAdams v. McFerron, 180 Miss. 644, 654-55, 178 So. 333, 336 (1938). *See also* Walker v. Williams, 214 Miss. 34, 58 So. 2d 79 (1952).

[15] 249 Miss. 26, 162 So. 2d 652 (1964).

[16] *Id.*

[17] 244 So. 2d 395 (Miss. 1971).

III. The *Thompson* Rationale: The American Jurisprudence Rule

Apparently *Thompson* has changed the rule stated in *McAdams v. McFerron*.[20] The court dismissed the *McFerron* case and the contention that a previous adjudication of abandonment precluded the father from regaining custody by stating, "We are of the opinion that this rule is too rigid and inflexible for such a sensitive area of the law and has in fact not been followed."[21]

The court found authority for this statement in *Mayfield v. Braund*,[22] decided by the court in 1953. In *Braund* a father had served a term in the penitentiary and had not visited his children for some time after he was released. Petitioner was seeking to adopt the children of respondent father without the father's permission, alleging that the father had abandoned his children. Respondent showed that he had not, in fact, abandoned his children, but rather that he had contributed to their support. He further showed that he had desired to see them but that the divorce decree which had granted custody of the children to their mother prohibited him from visiting them in the home of their maternal grandparents. The children resided in this home with their mother and continued to live there after the mother's death. In addition, one of the conditions of respondent's parole was that he was prohibited from leaving Washington County without permission. He was advised against attempting to see his children by both his attorney and the chairman of the State Parole Board. To have visited the children would have violated both his divorce decree and a condition of his parole. The main difference between *Braund*, on one hand, and *Thompson* and *McAdams* on the other, lies in the fact that the father in the former case was found not to have abandoned his children, whereas the father's adjudicated abandonment in the latter cases was a critical element.

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[18] Anderson v. Watkins, 208 So. 2d 573 (Miss. 1968), *citing* MISS. CODE ANN. § 2743 (1956); MISS. CODE ANN. § 1263.5 (Supp. 1966); Hodge v. Hodge, 186 So. 2d 748 (Miss. 1966); Grace v. Cummings, 253 Miss. 794, 179 So. 2d 836 (1965). *See* Reno v. Reno, 253 Miss. 465, 176 So. 2d 58 (1965), which holds that a previous decision in a child custody decree is res judicata as to facts in evidence at the time it was rendered. *See also* Beard v. Stevens, 239 Miss. 568, 123 So. 2d 860 (1960).

[19] *See* Fulton v. Fulton, 218 So. 2d 866 (Miss. 1969), *citing* MISS. CODE ANN. § 1263.5 (Supp. 1966).

[20] 180 Miss. 644, 178 So. 333 (1938).

[21] Thompson v. Foster, 244 So. 2d at 396 (Miss. 1971).

[22] 217 Miss. 514, 64 So. 2d 713 (1953), *suggestion of error overruled,* 217 Miss. 536, 65 So. 2d 235 (1953).

The *American Jurisprudence* rule apparently adopted in the *Braund* case and affirmed in *Thompson* is stated as follows:

> Generally a parent who, by reason of his misconduct, has been deprived of the custody of his child is entitled to have such custody restored, where he has reformed and repented of his evil ways and is presently able suitably to provide for the child.[23]

However, this rule is not the basis of the *Braund* decision, since the father was not found to have abandoned his children. Therefore *Braund* is not authority for concluding that the *McAdams* case is not controlling.

This rule forms the basis upon which Laddie Foster, Jr. was able to obtain custody of his son even though the chancellor had previously found that Laddie had abandoned the child.[24] Therefore, it is interesting to examine the cases from which the authors of *American Jurisprudence* formulated the rule. Only three cases are cited as authority for the rule.[25]

In *Bryan v. Lyon,*[26] decided in 1885 by the Indiana Supreme Court, the issue was whether a denial to a father of custody of his children in a previous divorce decree was res judicata against the father in a subsequent attempt by him to obtain custody. The dispute was between the father and other parties, the mother having died subsequent to the divorce. The father in the *Lyon* case was denied custody because he failed to prove that he could provide proper care and affection for the children. The decision includes dicta, however, indicating that a judgment of unfitness is not perpetual.[27]

The second case cited as a basis for the *American Jurisprudence* rule is *Farnham v. Pierce,*[28] decided by the Massachusetts Supreme Court in 1886. The issue was whether a statute authorizing the state to provide for a child's needs should be held unconstitutional, since the father's rights were not adjudicated. The court found that the statute was constitutional because the court acted upon the child by virtue of the doctrine of *parens patriae* rather than acting against the father. The father's rights were not adjudicated in the case, and since he was not a party to the suit the decision was not res judicata as to him.

Milwaukee Industrial School v. Milwaukee County,[29] another Wisconsin case, decided in 1876, was also cited by *American Jurisprudence.* This old case also involved the constitutionality of a statute authorizing the state to take custody of poor-house inmates, abandoned by their parents, and place them in industrial schools. The dispute between the county board of supervisers and an industrial school arose from the fact that the board refused to pay tuition to the school as required by the statute. The county board defended their non-payment by arguing that the statute was unconstitutional because it authorized imprisonment without due process of law. The Wisconsin Supreme Court, upholding the constitutionality of the statute, held that the commitment to the industrial school was not penal in nature but was for the best interest of the child. The court stated:

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[23] 39 AM. JUR. *Parent and Child* § 26, at 616 (1942).

[24] Thompson v. Foster, 244 So. 2d 395 (Miss. 1971).

[25] Bryan v. Lyon, 104 Ind. 227, 3 N.E. 880 (1885); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886); Milwaukee Indus. School v. Milwaukee County, 40 Wis. 328 (1876).

[26] 104 Ind. 227, 3 N.E. 880 (1885).

[27] *Id.*

[28] 141 Mass. 203, 6 N.E. 830 (1886).

[29] 40 Wis. 328 (1876).

> The statute before us carefully avoids that difficulty, [foreclosure of the right of the parent] and operates, so to speak, upon the child *in personam,* without citing the parent or guardian, without any color of intent to bind the parent or guardian by the proceeding or by the commitment. . . .
>
> When a parent or other proper guardian should be able to show that the disability or default on which the child's commitment proceeded was accidental or temporary, and no longer exists, and that he is . . . not otherwise unsuitable for the custody of the child, his right to the custody should prevail over the commitment to which he was not a party.[30]

Neither *Farnham, Bryan,* nor *Milwaukee Industrial School,* cited by *American Jurisprudence* as authority for the rule that a parent has the right to have custody of a child restored if he reforms, involved a parent who had been previously adjudged to have abandoned his child. No cases decided since 1886 have been cited as modern authority upholding the rule. However, *Thompson v. Foster*[31] applied this ancient rule and thereby created a modern authority for it.

The court actually created a new rule by upholding the presumption that a parent is best suited to have custody of his *child even though he abandoned the child from birth and furthermore had never established a normal parent-child relationship with the child.* The court was careful to cloak its decision in terms of the best interest of the child rule.

IV. Instability of the Child's Environment

Today is an age when the effect of environment upon one's psychological development is being recognized by the courts as well as psychologists. It has been held that since the stability of the child's environment is so important, in a custody dispute between the father and the grandparent, ". . . the Courts prefer not to change custody . . . where to do so would sever home ties of long standing."[32]

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[30] *Id.* at 339.

[31] 244 So. 2d 395 (Miss. 1971).

[32] Annot., 25 A.L.R.3d 71, *citing* Forbes v. Warren, 184 Miss. 526, 186 So. 325 (1939); McAdams v. McFerron, 180 Miss. 644, 178 So. 333 (1938). The court in *McFerron* stated that to change custody of the child would be cruel and contrary to the Mississippi law.

The result of failing to place the interest of the child above parental preference was aptly stated in *Bourn v. Hinsey,*[33] decided by the Florida Supreme Court in 1938. The Florida court said, ". . . when the ties of blood run counter to the force of environment, the former usually give way or tragedy follows."[34]

The fact is that the best interest of the child should be the basic test for determining child custody. The presumption that the best interest of the child is with the parents does not always hold up under the light of psychological examination. This presumption overlooks the present relationship which exists between a child and his psychological parent. This type of relationship promotes normal childhood development. Although at birth the potential for this type of relationship may be greater between the biological parent and the child, after prolonged interaction with another parent figure, the child's emotional stability may best be protected by leaving his custody with the psychological parent rather than awarding custody to the biological parent.[35]

If this psychological theory is true, (much evidence, as well as common sense, supports it)[36] can the courts really follow the presumption and still maintain that the presumption works for the child's best interest? Exactly how severe is the uprooting of the child from his stable environment? Psychological research has revealed that the "trauma of separating a child from the custody of an adult with whom an affection-relationship exists may be psychologically equivalent in its detriment to the orphaning of that child."[37] Not only is the best interest of the child in jeopardy, but the results may be severe if the presumption is followed. The better position would seem to be that the best interest of the child is served by maintaining his custody with his psychological parent, particularly in those cases where a court has adjudicated that the biological parent has abandoned the child. To gain custody the abandoning parent should have the burden of proving not only his own reformation, but also the unfitness of the psychological parent to continue to maintain custody of the minor child.[38] Only when the rule is set in terms of current scientific knowledge can the best interest of the child truly be preserved.

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[33] 134 Fla. 404, 183 So. 614 (1938).

[34] *Id.*, 183 So. at 617.

[35] Note, *Alternatives to "Parential Right" in Child Custody Disputes Involving Third Parties, supra* note 3, at 158-59. A "psychological parent" refers to the person with whom the child maintains that type of relationship, as evidenced by the type of affection, which is normally found in the parent-child relationship.

[36] *See* Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication. An Effort to Rely on Social Science Data in Formulating Legal Policies,* 4 LAW AND SOCIETY REV. 167 (1969-70). The authors point out evidence that the ". . . continunity of parential care may be more important to the child than the individual attributes of the parent who provides the care." *Id.* at 209.

[37] *Id.* at 161.

[38] Some courts have followed this two-fold requirement when the parent seeking custody has previously been denied such custody. *See* Wells v. Wells, 180 So. 2d 580 (La. App. 1965); *Ex-parte* Flora, 84 Utah 143, 29 P.2d 498 (1934). *See also* 67 C.J.S. *Parent & Child* § 13, at 675 (1950).

Recognizing the child's psychological needs in *Governale v. Haley*[39] in 1956, the Mississippi court held:

> [I]f the circumstances are such that the restoration of the child to the custody of the parent would probably result in serious detriment to the welfare of the child, the Court may properly refuse to order the child to be restored to the custody and control of the parents.[40]

V. Conclusion

The major problem is that the present law tends ". . . to overemphasize the modifiability and non-finality of custody decisions at the expense of the first and foremost need of children for stability of home environment and constancy and continuity of personal attachments formed."[41] Apparently fear of an error in awarding custody encourages the courts to maintain modifiability in their decrees. Of course, this objective is worthwhile and necessary. Nevertheless decrees should be modified only under extreme changes in circumstances and then only after a careful examination of all the relevant facts. Minimum protection of the child, as well as the preservation of judicial efficiency, requires a careful consideration of several factors including: "(1) the length of time the child [has] been with the parent substitutes, (2) the circumstances and conditions of the initial placement and the conditions agreed upon for its termination, and (3) the reasonableness of the inference that another change in custody would be harmful to the child."[42]

Decisions such as *Thompson v. Foster*[43] not only undermine the stability and security of the child's environment but actually encourage an unsuccessful litigant to continue to seek modification of custody decrees, strongly suggesting that mere persistance is the key to success. On the other hand, the successful litigant has gained nothing except temporary custody of the child pending another attempt by his adversary to seek modification.

Often, as in *Thompson*, the custodian is either an indigent or near-indigent and cannot afford the substantial legal expenses of continuous litigation. This diversion of scanty resources coupled with the lack of permanancy in custody decrees stands as a serious indictment of the ability of the law to deal intelligently and compassionately with a delicate problem of human life.

John L. Hunter

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[39] 228 Miss. 271, 87 So. 2d 686 (1956).

[40] *Id.* at 282, 87 So. 2d at 690-91.

[41] Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304-05 (1969).

[42] Foster & Freed, *Children and the Law*, 2 FAM. L.Q. 40, 43 (1968).

[43] 244 So. 2d 395 (Miss. 1971).

Palmer v. Thompson: A New Approach to Equal Protection?

I. Introduction

On June 14, 1971, the United States Supreme Court decided the case of *Palmer v. Thompson*,[1] affirming by a five to four vote, a court of appeals determination that in closing its swimming pools to all citizens, the city of Jackson, Mississippi, did not deny equal protection of the laws to a group of plaintiffs representing the black residents of Jackson.[2] The rationale utilized by the majority in reaching this result hinges upon conclusions which are worthy of comment because of their potential implications for future equal protection litigation and their apparent inconsistency with the basic thrust and reasoning of the Court's equal protection decisions in the years since *Brown v. Board of Education*.[3] This note examines the approach employed in *Palmer*, focusing primarily upon the majority's determinations that: (1) legislative motive or purpose[4] is irrelevant in determining the constitutionality of governmental actions[5] and (2) the city's action in closing its pools had no constitutionally impermissible effects. Particular attention is given to the part that these determinations play in the ultimate acceptance by the Court of the justifications offered by the city for its action. In assessing the significance of these crucial conclusions, the plaintiffs' basic position and the arguments advanced by the dissenting justices[6] will be considered with a view toward deciding whether *Palmer* does indeed introduce a new approach to equal protection litigation.

II. Background and Evolution of *Palmer*

In 1962 the city of Jackson maintained all of its public recreational facilities on a racially segregated basis. Three black residents of Jackson brought an action in federal district court, seeking relief from its state-enforced segregation. The district court granted a declaratory judgment that such enforced segregation was a denial of equal protection but refused to issue an injunction.[7] The affirmation of this decision by the Court of Appeals[8] made it obvious that the city could no longer maintain its facilities in such a manner. The city proceeded to desegregate all recreational facilities, including its five public parks, except for swimming pools. Stating that the pools could not be operated safely or economically on an integrated basis and acting in its legislative capacity, the city council closed the four city-owned pools and surrendered its lease on a fifth, which the lessor continued to operate for whites only.[9]

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[1] 403 U.S. 217 (1971).

[2] 419 F.2d 1222 (5th Cir. 1969).

[3] 347 U.S. 483 (1954).

[4] *Palmer* treats "motive" and "purpose" interchangeably, and although numerous commentators have attempted to enunciate workable definitions for the terms, no such definition has gained wide acceptance. The general confusion in this area is described in Ely, *Legislative and Administrative Motivation in Constitutonal Law*, 79 Yale L.J. 1207 (1968-69), wherein the author states, "By and large the term 'purpose' has served as nothing more useful than a signal that the court is willing to look at motivation, 'motive' as a signal that it is not." *Id.* at 1217. For discussion of this situation and the more important question of the relevance of motivation in constitutional adjudication *see* Ely, *supra;* A. Bickel, The Least Dangerous Branch 209-10 (1962); Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 82 Harv. L. Rev. 1065, 1091-92 (1969); Note, *Legislative Purpose and Constitutional Adjudication*, 83 Harv. L. Rev. 1887 (1969).

[5] 403 U.S. at 224-26.

[6] Justices Douglas, White and Marshall offer dissenting opinions. *Id.* at 231, 240, and 271 respectively.

A group of black citizens of Jackson then instituted another suit, primarily on equal protection grounds, to force the city to reopen and operate the pools on a desegregated basis. The district court found no denial of equal protection[10] and the Court of Appeals for the Fifth Circuit, sitting en banc, affirmed[11] with six of thirteen judges dissenting.[12] The Fifth Circuit majority assumed that motivation was a relevant factor in determining the constitutionality of governmental actions, stating: "Motive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights."[13] The court, however, rejected the plaintiffs' contention that the closing of pools in the face of a court order requiring their desegregation reflected a discriminatory "official position that it would prefer to operate no pools rather than operate unsegregated pools."[14] The court preferred to accept the city's justifications of safety and economy as "substantial and legitimate."[15] The majority found no discriminatory effect since the pools were closed to citizens of both races.

The Fifth Circuit dissent adopts much the same approach as the majority,[16] but views the facts differently and would reach a different result based on findings of both an unconstitutional effect and discriminatory motivation. Judge Wisdom's dissent offers a compelling argument against accepting the city's two justifications for closing its pools:

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[7] Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962).

[8] Clark v. Thompson, 313 F.2d 637 (5th Cir. 1963), *cert. denied,* 375 U.S. 951 (1963).

[9] Palmer v. Thompson, 403 U.S. at 224-26.

[10] The district court's decision is not officially reported.

[11] Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969).

[12] *Id.* at 1229 (Wisdom, J., dissenting).

[13] *Id.* at 1228.

[14] *Id.*

[15] *Id.* The district court found as a fact that:

> (1) The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public pools on an integrated basis.
>
> (2) These pools could not be economically operated in that manner. *Id.* at 1224.

[16] *Id.* at 1229. The approaches are the same in the sense that motivation is recognized as a permissible part of the calculus involved in adjudicating the con-

> Over fifty years ago, the Supreme Court demolished an excuse similar to the first excuse the City advances here. In *Buchanan v. Warley,* 1971, 245 U.S. 60, . . . the Court invalidated an ordinance . . . prohibiting Negroes from occupying houses in blocks where the greater number of houses were occupied by whites, and vice versa. The City urged that the ordinance "will promote the public peace by preventing race conflicts." The Court dismissed this argument with a single sentence: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws . . . which deny rights created or protected by the federal Constitution." Over fifteen years ago, in the second *Brown* decision, the Supreme Court declared: "[It] should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300 . . . . Over ten years ago, the Court dealt with a similar argument in the Little Rock school case, *Cooper v. Aaron,* 1958, 358 U.S. 1 . . . . After quoting *Buchanan v. Warley,* the Court said: "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional right." In *Watson v. City of Memphis,* 1963, 373 U.S. 526 . . . the City of Memphis sought to defend a gradual planned transition from segregated to integrated park facilities by asserting that it was necessary "to prevent interracial disturbances, violence, riots, and community confusion and turmoil," 373 U.S. at 535 . . . . For a unanimous Court, Mr. Justice Goldberg met this contention by asserting that the "compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise."[17]

Since the pools had never been operated profitably on a segregated basis and given the city's admission that the fees of ten and twenty cents were the lowest in the country,[18] Judge Wisdom found the city's economic justification to be "frivolous".[19]

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stitutionality of a governmental action. Judge Wisdom employed the "three factor test" approved by the Court in Reitman v. Mulkey, 387 U.S. 369 (1967). In order to determine the constitutionality of state action this test looks to (1) "the historical context and the conditions existing prior to its enactment" (2) its "immediate objective" and (3) its "ultimate effect". *Id.* at 373.

[17] Palmer v. Thompson, 419 F.2d 1222, 1230 (5th Cir. 1969) (Wisdom, J., dissenting).

[18] *Id.* at 1231.

[19] *Id.* at 1232.

III. The Plaintiffs' Position

A. *Motivation*. The Supreme Court granted certiorari to decide whether the city council's action in closing the pools was a denial of equal protection of the laws since it was motivated in whole or in part by a desire to avoid desegregation.[20] The plaintiffs' argument was essentially that a discriminatory closing alone, even without affirmative action through expenditures or otherwise, constitutes an equal protection violation. This position is supported by the Court's statement in *Griffin v. County School Board*:[21]

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegration do not qualify as constitutional.[22]

Also relied upon by the plaintiffs was the Court's per curiam ruling in *Orleans Parish School Board v. Bush*,[23] holding unconstitutional a state statute which allowed Louisiana's governor to close all public schools if any were faced with an order to desegregate. *Evans v. Abney*[24] contains dicta which offers further support for this position. Justice Black, writing for the majority, was willing to assume,[25] and Justice Brennan, dissenting, recognized that "under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility."[26] Thus, the plaintiffs argued that a closing which is racially motivated, like the discriminatory operation of a public facility, by itself constitutes an equal protection violation.

B. *Effect*. The plaintiffs also relied upon *Reitman v. Mulkey*,[27] urging that the closing has the impermissible effect of encouraging private discrimination. The unavailability of public pools forces citizens, if they are to swim at all, to patronize private segregated pools. Furthermore, the continued operation by the Y.M.C.A. of a previously city-leased pool is further evidence of such encouragement. Another discriminatory effect urged was that the closing may be viewed as tantamount to an official policy that blacks are somehow unfit to swim with whites, and the city detests integrated swimming to such an extent that it would rather close its pools than have them used by both races. Such a policy is impermissible since it has the psychological effect of denigrating the city's black citizens, officially sanctioning in their minds and the minds of others the myth of inferiority.[28] It was collaterally contended that the vacant pools and the previously public pool, which the Y.M.C.A. now operates for whites only, stood as constant reminders of this policy and constituted a "badge or incident" of slavery outlawed by the thirteenth amendment as construed in *Jones v. Alfred H. Mayer Co.*[29]

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[20] Palmer v. Thompson, 403 U.S. at 219.

[21] 377 U.S. 218 (1964). The Court held as a violation of the equal protection clause, the closing of all the public schools of Prince Edward County, Virginia, and the institution by state and county of a system of tuition grants from public funds to private segregated schools.

[22] *Id.* at 231.

[23] 365 U.S. 569 (1961). This ruling did not depend upon the presence of state financial aid, direct or indirect, to private segregated schools.

[24] 396 U.S. 435 (1970).

[25] *Id.* at 445.

[26] *Id.* at 453 (Brennan, J., dissenting).

[27] 387 U.S. 369 (1967). In *Reitman* the state of California repealed legislation prohibiting racial discrimination in the sale and rental of housing, thus encouraging racial discirimination in the housing market.

C. *The City's Burden of Justification.* If the plaintiffs' argument on motivation and effect is correct, the closing of the pools must be seen as governmental action which "trenches upon the constitutionally protected freedom from invidious official discrimination based on race."[30] As such, it "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[31] The city's justification of its actions on the grounds of safety and economy is insufficient under the "close scrutiny"[32] which is invoked when an equal protection violation is discerned.[33]

IV. The Majority Response: A New Rationale?

A. *General.* The Supreme Court's majority opinion in *Palmer* rejects the arguments tendered by the plaintiffs, with the following pronouncement:

> Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all of its citizens constitutes a denial of "the equal protection of the laws."[34]

Writing for the majority, Justice Black recognizes from the outset that "the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States . . ." and that there has obviously been "state action."[35] He questions, however, whether there is any action which does, in fact, deny equal protection. Since a state is under no affirmative duty to begin or continue to operate pools, blacks are not being denied access to facilities used by whites, and the city is not maintaining any segregated facilities.[36] Unless certain past cases, as urged by the plaintiffs, require a holding that closing the pools to all denied equal protection to blacks, the case must be affirmed. Black then distinguishes *Griffin, Rietman,* and *Bush* from the case at hand. *Griffin* differs because there were "many facets of state involvement in the segregated operation of 'private' schools" while *Palmer* has no city involvement "in the operation or funding of any pool."[37] *Reitman* does not lead to reversal since Black finds no evidence that the city conspired with the Y.M.C.A. to close its pool.[38] *Bush* is not considered plausible support for the petitioners' argument because the laws which it struck sought to maintain public education on a segregated basis, not to end it.[39] It is also implied that *Bush* is not in point because it involves, not swimming pools, but public schools, which are "perhaps the most important function of state and local governments."[40]

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[28] *Cf.* Brown v. Board of Education, 347 U.S. 483, 494 at n. 11 (1954).

[29] 392 U.S. 409 (1968).

[30] Palmer v. Thompson, 403 U.S. at 271 (Marshall, J., dissenting), *quoting* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

[31] *Id.*

[32] *See, e.g.,* 16 U.C.L.A. L. Rev. 716, 739 (1969).

[33] *See, e.g.,* Watson v. City of Memphis, 373 U.S. 526 (1963); Cooper v. Aaron, 358 U.S. 1 (1958); Buchanan v. Warley, 245 U.S. 60 (1917).

[34] 403 U.S. at 226.

[35] *Id.* at 220.

[36] *Id.*

B. *Motivation.* The majority opinion dispenses with any serious evaluation of plaintiffs' motivation arguments by a determination that such considerations are, in effect, irrelevant to the constitutionality of a legislative act:[41]

> [No] case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. The pitfalls of such analysis were set forth clearly in . . . *Fletcher v. Peck,* 6 Cranch 87, 130 (1810), where the Court declined to set aside the Georgia Legislature's sale of lands on the theory that its members were corruptly motivated in passing the bill. A similar contention that illicit motivation should lead to a finding of unconstitutionality was advanced in *United States v. O'Brien,* 391 U.S. 367, 383 (1968) . . . . That opinion explained well the hazards of declaring a law unconstitutional because of the motivation of its sponsors. First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. *Id.,* at 383, 384. Here, for example, petitioners have argued that the . . . pools were closed because of ideological opposition to racial integration in swimming pools. Some evidence in the record appears to support this argument. On the other hand the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators.[42]

Having determined that motivational considerations are tabu, the Court attempts to reconcile two prior decisions, *Griffin* and *Gomillion*

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[37] *Id.* at 222-24.

[38] *Id.* at 224.

[39] *Id.* at 221 n. 6.

[40] *Id.*

[41] *Id.* at 224-25.

[42] *Id.* at 224-25.

v. Lightfoot,[43] which indicate that the motive or purpose behind a law *is* relevant to its constitutionality.[44] This reconciliation is based upon the conclusion that the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the states to behave as they did. According to the majority's rationale, the considerations of motive and purpose in those cases can be regarded as superfluous, since effect was the controlling factor, to wit:

> In *Griffin,* . . . the State was in fact perpetuating a segregated public school system by financing segregated 'private' academies. And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections.[45]

C. *Effect.* The *Palmer* majority's rejection of motivation as a factor means that any assessment of the constitutionality of a governmental action depends exclusively upon a determination of its effects. The Court shows a surprising willingness to make this determination of effect on a relatively superficial level, apparently satisfied by the facially equal effect that closing the pools exerts on citizens of both races. The court exhibits no inclination to probe in search of less obvious, impermissible effects that might be felt by the minority race. Utilizing this seemingly restrictive approach, the majority upholds the city's actions, emphasizing that the "record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city," that "there is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only," and that the record reveals "no state action affecting blacks differently from whites."[46]

D. *The City's Burden of Justification.* The majority accepts the plaintiffs' contention that "a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action."[47] This point becomes moot, however, in light of the Court's findings as to effect. Only if some impermissible effect is discernable is the city required to offer more than a rational justification for its actions. Thus in *Palmer,* where the Court finds no unacceptable effects, the city's proffered reasons are sufficient.

V. The Dissenters' Criticism

A. *Motivation.* Although both Justice Douglas[48] and Justice White[49] disagree with the majority's conclusion that *Bush* is not relevant, both apparently acquiesce in the position that no prior case is precisely controlling.[50] Douglas characterizes the situation in these words:

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[43] 364 U.S. 339, 347 (1960).

[44] 403 U.S. at 225. (See n. 4 *supra*).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 226.

[48] *Id.* at 232 (Douglas, J., dissenting).

[49] *Id.* at 262 (White, J., dissenting).

> Our cases condemn the creation of state laws and regulations which foster racial discrimination—segregated schools, segregated parks . . . . The present case . . . is only an analogy. The State enacts no law saying that the races may not swim together. Yet it eliminates all its swimming pools so that the races will not have the opportunity to swim together. While racially motivated state action is involved, it is of an entirely negative character.[51]

Speaking the language of motivation, Douglas concludes that "though a State may discontinue any of its municipal services . . . it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant."[52] Similarly, Justice White is not persuaded by the majority's conclusion that "it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive."[53] His skepticism is precipitated by a view of *Griffin* that is diametrically opposed to the reading that case receives at the hands of the majority. White interprets *Griffin* as standing "first, and most importantly, . . . for the proposition that the reasons underlying certain official acts are highly relevant in assessing the constitutional validity of those acts."[54] It can be distinguished only "if one ignores its basic rationale and the purpose and direction of this Court's decisions since *Brown*."[55] White emphasizes that *Griffin* was only one of a series of cases stressing that fourteenth amendment rights "can neither be nullified openly and directly . . . nor nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' "[56] White lists numerous situations in which motivational analysis is practiced by the federal courts,[57] concluding that "Negro plaintiffs should have every right to prove that the action of the city officials was motivated by nothing but racial considerations."[58]

B. *Effect*. The dissenting justices vigorously disagree with the majority's determination that no impermissible effects resulted from closing Jackson's pools. White, especially, attacks the majority's acceptance of the facially equal consequences as being dispositive of the entire effect issue:

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[50] *Id.* at 261.

[51] *Id.* at 239 (Douglas, J., dissenting).

[52] *Id.*

[53] *Id.* at 241 (White, J., dissenting).

[54] *Id.* at 264.

[55] *Id.*

[56] *Id.* at 265, *quoting* Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[57] 403 U.S. at 241-43 (White, J., dissenting). White lists several statutes as requiring motivational analysis in certain situations. *See* 42 U.S.C. §§ 1982, 1983, 1985 (3) (1970).

[58] 403 U.S. at 243.

> As Judge Wisdom said in dissent below, the argument that the closing of the pools operated equally on Negroes and whites "is a tired contention, one that has been overworked in civil rights cases." 419 F.2d, at 1232 (dissenting opinion). It was made and rejected in *Griffin* . . . . It was advanced and rejected in different contexts in *Anderson v. Martin,* 375 U.S. 399 (1964) (designation of race on ballots), and *Loving v. Virginia,* 388 U.S. 1 (1967) (miscegenation law). The same argument was rejected in *Hunter v. Erickson,* 393 U.S. 385, 391 (1969), where we stated that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination. . . ."[59]

Justice White asserts that in *Palmer* "the reality is that the impact of the city's act is on the minority" because "the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility . . . ."[60] White's argument does not depend upon a finding that such an official view creates a "badge of slavery," but it is offered to show that beyond the superficially equivalent effects there is a greater impact upon the minority.

> Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.[61]

Perhaps a more important aspect of the effect issue which is avoided by the majority is the "chilling effect" argument. Douglas states the principle in this manner:

> When the effect is "to chill the assertion of constitutional rights by penalizing those who choose to exercise them" (*United States v. Jackson,* 390 U.S. 570, 581) that state action is patently unconstitutional.[62]

The courts must "look closely at the thrust of a law to determine whether in purpose or effect there was an invasion of constitutional rights."[63] White expounds upon the "chilling effect" which the closing has upon the Negro residents of Jackson:

> It is evident that closing a public facility after a court has ordered its desegregation has an unfortunate impact on the minority considering initiation of further suits or filing com-

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[59] *Id.* at 265-66.

[60] *Id.* at 266.

[61] *Id.* at 268.

[62] *Id.* at 236 (Douglas, J., dissenting).

[63] *Id.*

> plaints with the Attorney General. As Judge Wisdom said, "[T]he price of protest is high. Negroes . . . now know that they risk losing even segregated public facilities if they dare to protest . . . segregated public parks, segregated public libaries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether. . . ." 419 F.2d, at 1236 (dissenting opinion). It is difficult to measure the extent of this impact, but it is surely present and surely we should not ignore it. The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities. As such, it is illegal under the Fourteenth Amendment.[64]

Although the dissenters disagree with the majority's conclusions about the relevance of motivational considerations, their strongest attacks are reserved for assaulting the majority determination that no constitutional rights were infringed upon because the city's action affected both black and white equally.

C. *The City's Burden of Justification.* Justice Marshall characterizes the city's justification of its actions on grounds of safety and economy as "transparent."[65] White demonstrates impressively that the city's reasons for closing the pools are not sufficient to justify any impermissible effect.[66] The rationale utilized by the majority, however, forecloses any close consideration of the city's position. As viewed by the majority, the burden is on the plaintiffs to show that some constitutional right has been infringed upon. Absent a satisfactory demonstration, the city's actions need only be rationally related to some legitimate end, such as the preservation of order and economy. The dissenting justices agree that there *is* ample evidence of infringement upon the rights of the Negro residents of Jackson. This shifts the burden to the city to show some compelling justification for its action. It is also the consensus of the dissenting justices that the city could not conceivably justify its actions once the burden has been so shifted.

D. *The Concurring Opinions.* The two concurring opinions seem to miss the point entirely and are of interest chiefly for that reason. Both concurrences are apparently based upon the patently erroneous assumption that a finding for the plaintiffs would mean "that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped. . . ."[67] Justice Marshall responds to this argument of the concurring opinions in this manner:

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[64] *Id.* at 269-70 (White, J., dissenting).

[65] *Id.* at 273 (Marshall, J., dissenting).

[66] *Id.* at 254-61 (White, J., dissenting).

[67] *Id.* at 228 (Burger, C.J., concurring). Justice Blackman echoes this language in expressing his concern over the affirmative response of plaintiffs' counsel to the inquiry at oral argument of "whether the city was to be 'locked in' with its pools for an indefinite time in the future . . . ." *Id.* at 230. (Blackman, J., concurring).

> [I] cannot conceive why the writers of the concurring opinions believe that the city is 'locked-in' and must operate the pools no matter what the economic consequences. . . .Equity courts have always had continuing supervisory powers over their decrees; and if a proper basis for closing the facilities. . . could be shown, swimming pools, as I imagine schools or even golf courses, could be closed.[68]

VI. Conclusion

The rationale or approach employed in *Palmer* may be stated as follows: When actions of a governmental unit acting in a legislative capacity allegedly violate the equal protection clause of the fourteenth amendment, the scope of judicial inquiry is limited to consideration of the effects or impact of that action. The motivations of the governmental unit in undertaking this action cannot invalidate any action that is otherwise legitimate. If the governmental action, on its face, affects all citizens equally, there is no violation of equal protection. If no impermissible effect of the governmental action is discerned, there has been no violation of equal protection, and the governmental unit is not required to justify its actions beyond a showing that they are rationally related to some legitimate end.

This approach may be regarded as "new" for three reasons. (1) Consideration of the motivation behind a governmental action is declared irrelevant to a determination of the constitutionality of that action, despite language in previous cases which suggests that such considerations are permissible.[69] (2) The Court in *Palmer* is willing to accept the facial effect of governmental action as conclusive when there were ample, albeit more subtle, effects present which could have been held impermissible in light of prior decisions.[70] (3) The "close scrutiny" which has become so familiar in equal protection litigation is not invoked to require the governmental unit to justify its actions, although there are strong indications that the reasons advanced for these actions have been deemed insufficient in previous cases.[71] While the trend since *Brown* has been toward expansion of the scope of equal protection, *Palmer* represents a refusal by the Court to further extend that principle into the area of governmental termination of public facilities. Whether the approach utilized by the majority will be carried over into other areas of equal protection litigation remains to be seen, but any future attempt by the changing Court to retreat from the presently expansive bounds of equal protection will find a comfortable precedent in *Palmer*.

Ross F. Bass, Jr.

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[68] *Id.* at 273 (Marshall, J., dissenting).

[69] *E.g.,* Griffin v. County School Bd., 377 U.S. 218 (1964); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961); Gomillion v. Lightfoot, 364 U.S. 569 (1960).

[70] *E.g.,* United States v. Jackson, 390 U.S. 570 (1968); Reitman v. Mulkey, 387 U.S. 570 (1967).

[71] *See* cases cited n. 33 *supra.*

EQUAL PROTECTION IN SCHOOL FINANCING

I. INTRODUCTION

Over ninety years have passed since the Supreme Court first ruled that the equal protection clause of the Constitution's fourteenth amendment had been violated by a state's action. During this time the interpretation of the amendment has expanded considerably. Its growth, while apparently disconcerting and ominous to many, hardly seems to be slowing. Indeed, further expansion of equal protection coverage appears inevitable.

It is the purpose of this note to investigate the proposed application of the fourteenth amendment to taxpayers and school children because of the effects of public school financing schemes. Invidious discrimination based on wealth will be considered as a foundation for an attack on the schemes, as will education as a fundamental right to be protected. Policy factors that allegedly justify and support present financing systems will be considered; typical state educational financing programs will be presented. Hopefully, some insight into the question of the constitutionality of such systems will be gained.

A brief summary of the development of equal protection principles is appropriate here. Since the decision in *Strauder v. West Virginia*,[1] the principles of guaranteeing equal protection are two, the classifying fact and the interest affected by the classification. Certain classifying facts are considered to be suspect and to deserve special scrutiny.[2] Race as a classifying factor is, of course, suspect.[3] *Griffin v. Illinois*[4] and *Harper v. Virginia Board of Elections*[5] show that wealth as a means of classification is also suspect. This is not to say that the use of wealth as a classifying fact is always unconstitutional; for income and estate taxation purposes it is acceptable. In *Griffin* the Court held that the failure of the state to provide a free trial transcript for a poor defendant denied him equal protection, while in *Harper* the Virginia poll tax was found unconstitutional. In both cases the ability to attain fundamental rights (to have a fair criminal proceeding and to carry on political activity) were found to be a function of wealth.

The above interests are apparently the only two the Court has found deserving of its special attention in equal protection coverage.[6]

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[1] 100 U.S. 303 (1880). The Court found that the statutory exclusion of Negroes from juries violates the fourteenth amendment.

[2] Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CAL. L. REV. 305, 348 (1969).

[3] Loving v. Virginia, 338 U.S. 1 (1967). While racial classification is suspect, it is not necessarily disfavored, *e.g.,* to bring about the integration of schools.

[4] 351 U.S. 12 (1956).

[5] 383 U.S. 663 (1966).

[6] Coons, Clune & Sugarman, *supra* note 2. It should be noted that the classification by race need not be coupled with a fundamental interest to be violative of the amendment.

When classification by wealth infringes on either the interest of a person's carrying on political activity or defendant's receiving a fair trial, it is apparent that the Court will see fit to intervene, regardless of whether it was the state's purpose to limit the right or not.[7] The question now presented is whether a state's education financing system is a classification by wealth and, if it is, whether it is of such a nature that it infringes upon a fundamental interest. The case in point is *Serrano v. Priest.*[8]

Several elementary and high school students and their parents brought a class action against certain county and state officials, seeking a declaratory judgment that California's system of school financing is unconstitutional and asking for injunctive relief. Plaintiffs contended that they represent a class of all public school pupils and parents of all school districts in California " 'except . . . [their counterparts] in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California.' "[9]

The complaint alleged: that "as a direct result of the financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State. . . ."[10] Thus, it is claimed, the scheme violates the equal protection clause of the fourteenth amendment.

After sustaining general demurrers from the defendants and the failure of the plaintiffs to amend their complaint, the trial court granted defendants' motion for dismissal. The California Court of Appeals affirmed.[11]

Reversing the lower court's decision, the California Supreme Court evaluated California's system of school financing, considered wealth as a suspect classification, found education to be a protected fundamental interest, weighed the state's interests in the present scheme, and finally decided the system should be invalidated as violative of the equal protection clause of the fourteenth amendment.[12]

II. THE EDUCATIONAL FINANCING SYSTEM

California's public schools are mainly funded through the local effort of ad valorem taxation and bond issues and by aid from the state. Most of the money comes from the local property tax, while just over a third is contributed by the state.[13]

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[7] *Id.*

[8] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[9] *Id.,* 96 Cal. Rptr. at 604, 487 P.2d at 1244.

[10] *Id.*

[11] 89 Cal. Rptr. 345, 10 Cal. App. 3d 1110, (Cal. App. 1970).

[12] Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

[13] *Id.,* 487 P.2d at 1246, 96 Cal. Rptr. at 606.

State aid in California is divided into three major parts under the "foundation program." Basic state aid is a flat $125 grant per average daily attendance (ADA) to every school district in the state; the second part is "equalization aid." It is distributed in inverse proportion relative to the wealth of the district. Supplemental aid goes only to the poorest districts.[14]

To ascertain the amount of equalizing aid each school district may receive, the State Superintendent of Public Instruction determines how much local revenue would be raised if the district levied a hypothetical ten mill property tax in each elementary school district and an eight mill tax in each high school district. He then adds to each district's total the $125 basic state aid grant. If the total is less than the amount specified as the minimum by the foundation program, the state contributes the difference. Therefore, the equalization fund guarantees the poorer districts a basic minimum amount of revenue, while the richer district are ineligible to receive such assistance.[15]

Finally there is supplemental aid which goes only to particularly poor districts. Elementary school districts with an assessed evaluation of $12,500 or less per ADA may receive up to $125 per ADA. High school districts which have a $24,500 or less evaluation per ADA may be allocated up to $72 extra per ADA. These poorest districts must set property tax rates above a specified level to be eligible. So districts which are willing to bear a greater tax burden are benefited by state supplemental aid. It should be noted that funding under this program is over and above basic state aid and equalization aid.[16]

The Supreme Court of California noted that basic state aid actually was of no real help to the poorer districts while a boon to the richer ones.[17] If a poorer district is $300 below the foundation program minimum, the state makes up the entire $300 through the equalizing program, but under the present program only $175 through equalization aid. The other $125 is made up by basic state aid. Because each district, no matter how poor (or rich), receives the $125 basic grant, a tremendous amount of state educational funds is given to districts that can easily be self-sufficient, thus depriving the needy, poorer districts of a great deal of money.[18]

It is admitted that equalization and supplemental aid mitigate the disparities between districts. However, wide differentials continue in the expenditure per ADA. These programs which benefit poorer districts exclusively are an ineffective effort to offset the inequities of education buying power. Examples are cited for the low, median, and high in average valuation per pupil (AVPP) and expenditure per ADA:

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[14] *Id.*, 487 P.2d at 1247, 96 Cal. Rptr. at 607.

[15] *Id.*

[16] *Id.*

[17] *Id.*, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

[18] *Id.* The court cited the LEGISLATIVE ANALYST, PUBLIC SCHOOL FINANCE, PART II, THE STATE SCHOOL FUND: ITS DERIVATION, DISTRIBUTION, AND APPORTIONMENT (1970) as stating that about one-half of all state educational funds go to basic state aid.

AVPP	Elementary	High School
Low	$103	$11,959
Median	19,600	41,309
High	952,156	349,093

Expenditure per ADA

	Elementary	High School	Unified
Low	$407	$722	$612
Median	672	898	766
High	2,586	1,767	2,414[19]

It is obvious that the statistics reinforce the Court's statement that the gaps are not closed.

All states except Hawaii have educational financing systems which are essentially the same in effect, if not in form, as that of California.[20] In Mississippi, for example, the system is tripartite. The local governments supply slightly less than twenty-six percent directly through the district maintenance; the state supplies almost fifty-three percent of the funds under the minimum foundation program of equalizing aid; and the federal government pays just over twenty-one percent of the total cost. In the 1969-70 school year equalizing aid totaled about $165,000,000, of which the counties contributed $17,692,000. Each county is required to pay a percentage of the $17,692,000 according to its relative wealth. An economic index of several factors, including sales tax receipts and assessed valuation of public utilities, sets for each school district a fraction to be paid. The richest school districts (led by the Jackson Municipal Separate School District at 11.90311% of the total) pay the most, while the poorer ones pay lesser shares. In return the state pays the entire fund to the districts based on average daily attendance. So while the districts contribute according to their ability, they share in the equalizing fund without regard to wealth, or lack thereof.

The result of equalizing aid in Mississippi's financing scheme is really hard to isolate because of the large portion of funds being derived from the federal government. One hundred seventeen of 148 school districts (county, consolidated, and municipal separate) get some federal funds, ranging from $.45 per ADA in the East Jasper district to $268.47 per ADA in the McComb Municipal Separate.[22] The average amount of federal funds per county school district is $57.59 per ADA of an average total expenditure of $448.64 per ADA. For consolidated distric the federal share is $67.74 of the $454.02 ADA average. In the municip separate districts, federal funds make up $52.95 of the average tot expenditures of $472.95 ADA. Hence, the amount of federal fun utilized is extremely important in deciding the equity of the state financing scheme.[23]

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[19] Serrano v. Priest, 487 P.2d at 1247, 96 Cal. Rptr. at 607.

[20] Coons, Clune, & Sugarman, *supra* note 2, at 312. Hawaii's educational system is fully centralized.

[21] Conversation with W. S. Griffin, Assistant State Superintendent of Education and Chief Finance Officer, Mississippi State Department of Education, November 17, 1971.

[22] MISS. STATE DEP'T. OF EDUC., CURRENT EXPENDITURE PER PUPIL BY SCHOOL DISTRICT AND RELATED INFORMATION, SESSION 1969-70.

Noxubee County School District, the district with the highest p ADA expenditure at $825.34 per pupil, receives $185.44 in federal a sistance. Without the federal aid it still would be able to provid $639.90 per ADA; with the average amount of federal funds it woul provide $697.49 per student. The county school district with the lowe per ADA outlay, Wayne County School District, raises and receives onl enough to spend $327.85 per ADA. Wayne County enjoys no feder aid in its educational financing. Even if it received the average feder grant for its class (county school district), this district would only b able to expend $385.44 per pupil on education. But because Wayn County's assessed valuation per ADA (AVPP) is only forty perce of Noxubee's, it must burden its citizens with a one-third greater ta for education than Noxubee County.[24]

Despite the fact that Mississippi's system of educational financin tempers the disparities between its richer and poorer districts, it, lik California, does not have a scheme that effectively provides equal bu ing power for its several school districts. Thus the complainants i *Serrano* would have the same complaint against the State of Mississip as against California.

III. Wealth As A Suspect Classification

After discussing the state's educational financing system, the Cal fornia Supreme Court stated, as this note has, that the use of wealt as a legislative classifying factor is suspect. This cannot be doubte Further, the court found that because locally raised funds, the avail bility of which is necessarily relative to the wealth of the district, mak up so much of the educational funds, the expenditure for public schoo is essentially a function of the district's wealth. Defendants' contentio that expenditure is partly determined by the district's tax rate w rejected by the court. Indeed, the court felt that one of the argumen against the present system is that richer districts can raise more mone with a low tax rate than poorer districts with a much higher tax rate.

Still considering wealth as a suspect classification, the court wit no apparent precedent stated:

> [We] reject defendant's underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not of the individual. We think that discrimination on the basis of district wealth is equally invalid.[26]

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[23] *Id.*

[24] *Id.*

[25] 487 P.2d at 1250-52, 96 Cal. Rptr. at 610-12.

[26] 487 P.2d at 1252, 96 Cal. Rptr. at 612.

While no court seems to have published this idea, the principle is not original with the Supreme Court of California. Messrs. Coons, Clune, and Sugarman in a recent article present this proposition: The quality of public education may not be a function of wealth, other than that of the state as a whole.[27]

Such a proposition is not based on *stare decisis* but is merely the opinion of the authors of the point to which equal protection should direct itself.

The first thought which comes to mind upon reading the proposition is why, if the idea is derived from the nation's constitution, should it not be equally unacceptable for educational quality to be a function of the wealth of the state? If the fourteenth amendment is to set a policy, it should be a national policy. Public school children in Wayne County, Mississippi, have the same rights under the United States Constitution as their counterparts in Los Angeles County, California. As equitable as that proposition might appear, the equal protection clause does not demand such a policy; it, of course, applies only to the states and their actions.

The question, then, is whether all public school children within the state have a right to equal educational expenditure (and thus equal educational quality) regardless of the wealth of the school district in which he happens to live. The Supreme Court of California answered this question in the affirmative.

IV. Education As A Fundamental Interest

Finding education to be a fundamental interest, the court noted that almost all states consider education to be so important that they have enacted laws to require school age children to attend school. Its opinion emphasized the " 'pivotal position of education to success in American society and its essential role in opening up to the individual the central experience of our culture lend it an importance that is undeniable.' "[28] The court cites dicta, indicating the importance of education, from the United States Supreme Court in *Palmer v. Thompson*:[29]

> Of course that case *(Brown v. Board of Education)*[30] did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments."[31]

Certainly the importance of education makes a right to it "a fundamental interest," but this does not necesarily mean all public school pupils have a right to equal educational equality and expenditure. Indeed, while the court in *Serrano* cites two California decisions[32] which seem to call for such educational equality, the weight of authority is contrary.

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[27] Coons, Clune & Sugarman, *supra* note 2, at 340.

[28] 487 P.2d at 1256, 96 Cal. Rptr. at 616.

[29] 403 U.S. 217 (1971), *citing* note, *Development in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1129 (1969).

[30] 347 U.S. 483 (1954).

[31] Serrano v. Priest, *supra,* n. 26, at 618-619.

The principal case in the area is nearly identical to the present cause of action. In *McInnis v. Shapiro*[33] plaintiff school children sought in a class action to have Illinois' public school financing structure declared unconstitutional because it was violative of their fourteenth amendment rights under the equal protection clause. The Illinois scheme of educational financing is essentially the same as that of California. The three-judge panel found plaintiffs did not have a cause of action and dismissed the case. The United States Supreme Court's summary affirmation is a decision on the merits, as is noted by the lower level appeal of *Serrano v. Priest.*[34]

In *McInnis* the three-judge panel of the District Court for the Northern District of Illinois spoke often of the nebulous concept of apportioning funds according to educational needs and "the lack of judicially manageable standards,"[35] making the controversy non-justiciable. The California high court distinguished *Serrano* from *McInnis,* stating that the nebulous "need" concept was not involved. Because the plaintiffs in California based their complaint entirely on wealth as a suspect classification and education as a fundamental interest and not on educational need, the Illinois case was not considered controlling.[36] It seems, however, the court overlooked the gist of *McInnis.* The conclusion of the *McInnis* opinion states:

> The present Illinois scheme for financing public education reflects a rational policy consistent with the mandate of the Illinois Constitution. Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. Moreover, the statutes which permit these unequal expenditures on a district to district basis are neither arbitrary nor unreasonable.[37]

The court in Illinois could hardly have expresed itself more explicitly on the questions arising in *Serrano.*

The Supreme Court of California chose to follow the lead of Messrs. Coons, Clune, and Sugarman[38] and hold that the United States

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[32] San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963).

[33] 293 F.Supp. 327 (N.D. Ill. 1968), *affd. mem. sub. nom.* McInnis v. Olgilvie, 394 U.S. 322 (1969).

[34] 89 Cal. Rptr. 345, 10 Cal. App. 3d 1110 (Cal. App. 1970).

[35] 293 F.Supp. at 329.

[36] 487 P.2d at 1263-65, 96 Cal. Rptr. at 623-25.

[37] McInnis v. Shapiro, 293 F.Supp. at 336.

[38] Coons, Clune & Sugarman, *supra* note 2, at 308-09.

Supreme Court's summary affirmance was not dispositive of the matter. The court reasoned that the Supreme Court's jurisdiction was not discretionary, that one commentator had observed that such a dismissal of an appeal is practically the same as a denial of certiorari, and that between sixty to eighty-four percent of all appeals in recent years had been summarily handled; therefore, the summary affirmation should somehow be dismissed as precedent.[39] Oddly, the court cites Stern and Gressman, *Supreme Court Practice,*[40] and then fails to follow its instructions. That authority states that a summary affirmance is a decision on the merits.[41] Equally peculiar is the court's commentary as to the significance of the issue presented and its deduction that the United States Supreme Court would not dismiss such an important matter summarily if it felt there was more to be said on the matter.[42]

Left unsaid in *Serrano* was the fact that in criminal procedure cases, the proposed ancestors of an equal protection argument against the school financing system, the guarantee to defendants under the fourteenth amendment is to competent, active counsel. The cases make it obvious that there is no right to perfect counsel or the best advocate; a minimum of competency must be met.[43] It can logically be suggested that the fundamental right in education is not to receive the best education or an equal education but, rather, a minimum, competent education. The guarantee reaches only to the foundation level, as in criminal cases. Just as the fortunate man can choose to pay for the best available counsel, so can those willing and able to pay the price choose superior educational opportunity.

While it is the conclusion of this note that the Constitution does not require a change from present educational financing schemes, it is not the writer's purpose to declare that there is not room for improvement in these systems. Because a structure is not unconstitutional, it is not necessarily flawless or even desirable. Legislative search for acceptable alternatives to the presently imperfect system is in order. State interests, the basic one of which seems to be a continuance of as much local control as possible of public education and its financing, need not be sacrificed.

Messrs. Coons, Clune, and Sugarman in their very comprehensive article on state educational financing present at least one alternative worthy of consideration. They call it the "District Power Equalizing" plan. Under the plan the offering (expenditure per ADA) is exactly proportionate to the effort of the district (i.e., the amount the district is willing to tax itself for education). If the richest school district in the state and the poorest each is willing to burden itself with a fifteen mills taxation effort for public education, then each receives the same amount to spend per pupil. Thus, educational expenditure becomes a function of the people's effort, of their desire to support education.[44] This highly equitable system of financing, while not required by the Constitution, seems at least worth investigating for it still gives the greatest amount of control to localities. Surely there are other original and hybrid alternatives which should be scrutinized by state government.

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[39] 487 P.2d at 1264, 96 Cal. Rptr. at 624.

[40] R. Stern & E. Gressman, Supreme Court Practice (4th ed. 1969).

[41] *Id.* §§ 4.28, 5.16.

[42] 487 P.2d at 1264-65, 96 Cal. Rptr. at 624-25.

[43] MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); United States *ex. rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949); Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945); and Stewart v. State, 229 So. 2d 53 (Miss. 1969).

V. Conclusion

While this note must take the position that the court in *Serrano* was erroneous as to the United States Constitution, its purpose is not to whitewash the partial ineffectiveness of equalization programs in state educational financing schemes. Most certainly, problems and inequities exist and must be corrected. However, social engineering by courts outside the demands of the Constitution is unacceptable as a panacea. Mere errors in judgment on the part of state governments should never by deemed to justify judicial intervention under the guise of some constitutional call. Popular government must be allowed to correct its mistakes and erase its simple inequities through popular means. Otherwise these protectors of the Constitution, by taking over the legislative function, will have caused the erosion of the very principles which they attempt to uphold.

Haley Barbour

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[44] Coons, Clune & Sugarman, *supra* note 2, at 319-21.

CLASS ACTIONS AND EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

*Paul O. Miller, III**

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. It provides a procedure whereby a person claiming to be aggrieved may file a charge with the Equal Employment Opportunity Commission, whose duty it is then to investigate the charge and, if reasonable cause exist to believe that the charge is true, seek to eliminate any such alleged unlawful employment practices found to exist by informal methods of conference, conciliation, and persuasion.[2]

Although the Act emphasizes the conciliatory approach when reasonable cause is found to believe an unlawful employment practice exists, the courts have held that as a prerequisite to instituting suit in federal court, the aggrieved party in a Title VII proceeding need only: (1) file a timely charge with the EEOC; and (2) receive the statutory thirty day right to sue letter,[3] and therefore actual conciliation efforts are not required when reasonable cause is found to believe a violation has occurred. This line of reasoning has been extended so that an aggrieved party can file a charge with the EEOC, wait sixty days,[4] ask for the right to sue letter, and then, within thirty days thereafter proceed immediately into court without the EEOC conducting an investigation or even serving a copy of the charge on the respondent.[5]

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[1] 42 U.S.C., §§ 2000e (1) – (15) (1964).

[2] The Equal Employment Opportunity Commission does not have enforcement powers and if unable to achieve voluntary compliance, must issue a notice to the aggrieved party informing him of his right to bring a private suit in federal court. 42 U.S.C. §§ 2000e–5 (a), (e) (1964).

[3] Beverly v. Lone Star Lead Const. Co., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local 6, Laborers Union, 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970); Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Dent v. St. Louis-S. F. Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969).

[4] The EEOC Rules and Regulations provide that at any time after the expiration of sixty days from the date of the filing of the charge, the charging party may demand in writing that a notice of right to sue letter issue. 29 C.F.R. § 1601.25a (c) (1971).

In those cases in which the EEOC fails to find that reasonable cause exists to believe an unlawful employment practice has occurred, the aggrieved may nevertheless bring suit in federal court,[6] based on the dismissed charge.

Thus, although Congress envisioned a framework in which conciliatory efforts would be the primary methods to eliminate unlawful employment practices under Title VII, the courts have chosen to arrogate from the EEOC the role of champion of the aggrieved. Such a role, although resented by those sued, is perhaps the most efficient and effective method of eliminating unlawful employment practices. The big stick of the injunction, even as only a threat by the aggrieved party, carries far more weight than does the conciliation agreement toward the permanent elimination of discriminatory barriers to equal employment opportunity.

In this vein, the most effective device for achieving the result sought by Title VII is the class action, the subject of this article. Since its enactment Title VII has caused a furor in the courts, primarily over procedural questions. The matter of the class action has raised a series of questions that are still somewhat unresolved, causing disagreement and some confusion in the various federal courts of this country. It is in the hope of deciphering the maze of decisions and offering a guide for practitioners facing this complex area of the law that this article is written.

I. THE ISSUES THAT MAY BE RAISED IN BRINGING THE CLASS ACTION

The Fifth Circuit Court of Appeals has set forth the following requirements for bringing a class action under Title VII: (1) The class must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure; and (2) the issues raised must be those which the plaintiff had standing to raise and did raise before the EEOC.[7]

The question of what issues the plaintiff has standing to raise has caused some interesting litigation, especially when the plaintiff is a job applicant. In *Carr* v. *Conoco Plastics, Inc.*,[8] the court held that a job applicant may raise issues as to in-plant discriminatory practices, even though the aggrieved is not an employee, when those practices, although not injurious to him at the time of his application for employment, potentially affect him because of his race. In the court's language: "It is foolhardy to say that once plaintiffs have removed racial discriminatory practices at the door, they are required to start anew in order to remove those that exist on the inside."[9]

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[5] Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258 (N.D. Miss. 1971).

[6] Beverly v. Lone Star Lead Const. Co., 437 F.2d 1136 (5th Cir. 1971).

[7] Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

[8] 295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd per curiam,* 423 F.2d 57 (5th Cir. 1970), *cert. denied,* 400 U.S. 951 (1970).

The court in *Johnson v. ITT-Thompson Industries, Inc.*[10] expanded the *Carr* decision by holding that the job applicant can raise various in-plant issues in his complaint before the court even though the EEOC charge was limited to the refusal to hire. In the court's opinion, the in-plant racial discriminatory policies were sufficiently relevant to the hiring policy discrimination to allow the plaintiff to include the former in the complaint.

Subsequent to *Johnson,* the Fifth Circuit in *Danner v. Phillips Petroleum Co.*[11] held that the complaint in federal court may encompass any discrimination "like or reasonably related to the allegations of the charge and growing out of such allegations."[12] Although a liberal interpretation of this rule would allow the complaint to be substantially expanded beyond the charge as it was in *Johnson,* the facts in *Danner* were more restricted. Mrs. Danner in her EEOC charge only alleged unlawful discharge but expanded her complaint to include unlawful seniority and bidding practices. However, she was discharged when her job was eliminated, and due to discriminatory seniority and bidding practices, she could not transfer to another job. Therefore, the reasons for her discharge were reasonably related to her allegation of unlawful discharge.

Thus, although *Danner* was limited by the facts as to how far the charge may be expanded in the complaint, the court in *Johnson* did not have any qualms with a substantial expansion. In view of the extent to which the courts have eroded the EEOC's role in Title VII cases by holding that it is not necessary that the EEOC be given an opportunity to conciliate where reasonable causes exists to believe a violation has occurred,[13] or investigate the charge, or even serve the charge on the respondent,[14] allowing the plaintiff in his complaint to substantially expand the charge is the corrollary to the previous decisions that is to be expected.

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[9] *Id.* at 1289.

[10] 323 F. Supp. 1258 (N.D. Miss. 1971).

[11] 447 F.2d 159 (5th Cir. 1971).

[12] *Id.* at 162.

[13] See authority cited in note 3 *supra.*

[14] Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258 (N.D. Miss. 1971).

Since in some cases the procedure before the EEOC satisfies a mere technical prerequisite to court action with the EEOC performing only a clerical role, there is little necessity for restricting the aggrieved party to his EEOC charge. In those cases in which the respondent has not been served with the charge or, having been served, no investigation is conducted by the EEOC, the respondent is not prejudiced by an expansion of the charge. However, a more strict rule should be utilized in those cases in which an EEOC investigation has been conducted and a decision rendered, finding reasonable cause exists to believe a violation has occurred. In those cases the respondent has placed some reliance on the allegations before the EEOC as constituting the case against him. Further, the respondent may not have been willing to conciliate those allegations but would have had a different inclination if all the allegations of the complaint had been made before the EEOC.

II. Meeting The Rule 23 Requirements

The second requirement for bringing a class action under Title VII as set forth in *Oatis v. Crown Zellerbach Corp.*,[15] is that the requirements of Rule 23 of the Federal Rules of Civil Procedure must be met.

Rule 23 (a) contains the following requirements: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.

In addition to satisfying the requirements of Rule 23 (a), the class action must fall within the purview of one of the subsections of Rule 23 (b).[16]

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[15] 398 F.2d 496 (5th Cir. 1968).

[16] Fed. R. Civ. P. Rule 23 (b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds

However, this latter mentioned requirement has not posed any substantial problem to the courts as they have allowed class actions under Title VII to be maintained under both Rule 23 (b) (2)[17] and Rule 23 (b)(3).[18]

Therefore the remainder of this article will delimit itself primarily to the requirements under Rule 23 (a).

A. The Numerosity Requirement

Rule 23 (a)'s requirement that the class must be so numerous as to make joinder of all members impracticable has, like the other requirements under Rule 23, been subject to different interpretations.

In *Local 246, Utility Workers Union v. Southern California Edison Company,*[19] the defendant contended that as to one plaintiff there were only eight persons who could constitute a class and as to the other plaintiff, there was only one person. However, the court pointed to the fact that the bringing of a class action is a matter of judicial discretion and in upholding the class action, stated:

> The very nature of the Civil Rights Act contemplates the bringing of a class action by even a small number of discriminated-against persons on behalf of all who are similarly situated.

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generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[17] *See* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Rios v. Local 638, Steamfitters Union, 3 FEP Cases 897 (S.D. N.Y. 1971); Roman v. Reynolds Metals Co., 3 FEP Cases 228 (S.D. Tex. 1970); Moss v. Lane Co., Inc., 50 F.R.D. 122 (W.D. Va. 1970); Butler v. Local 4, Laborers Union, 308 F. Supp. 528 (N.D. Ill. 1969); Local 186, Pulp Union v. Minnesota Mining and Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969). *See also* Notes of Advisory Committee on Rules Relating to 1966 Amendments of Fed. R. Civ. P. 23 (b) (2), 28 U.S.C., Appendix 1601 (Supp. III 1967).

[18] *See* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[19] 2 FEP Cases 328 (C.D. Calif. 1969).

> Its purpose is to afford a broad remedy which comes to the rescue of all persons fitting the class of the plaintiffs. A class action is proper under Title VII filed on behalf of all persons who have applied and who will apply to an employer for employment.[20]

A contrary holding is found in *Chavez v. Rust Tractor Co.,*[21] an action alleging unlawful discharge brought by a Spanish-surnamed former employee. The records revealed only ten other such persons had been discharged by the employer since the effective date of Title VII, and the court held that such a class is not so numerous as to make joinder, if they desired, impracticable.

Although in these two cases the courts' divergent holdings are based on the numerosity requirements, the latent reasoning is based upon the definition of the class. In *Local 246,* the court actually rejected the defendant's contention as to the scope of the class and broadened the class to include future as well as present employees; in *Chavez,* the court limited the class to the Spanish-surnamed employees who had already been discharged.

Actually the numerosity requirement is not critical to those employees who want to participate in the litigation since, if there are not a sufficient number to bring a class action, they can join as co-plaintiffs under the rule of *Oatis v. Crown Zellerback Corp.*[22] This is permissible regardless of whether they have pursued their remedies before the EEOC. Thus the only persons who are harmed by the failure of a class action are those who fail to assert their rights and join as co-plaintiffs. However, this does not preclude them from pursuing their Title VII rights themselves before the EEOC and if necessary, later in federal court.

B. Common Questions of Law or Fact

Rule 23 (a) (2) requires that there be questions of law or fact common to the class. The Fifth Circuit as well as a number of district courts have followed an "across the board" concept in race discrimination cases and held that since race discrimination is by definition class discrimination, the common question of fact is the question of discrimination because of race. In the words of the courts, the "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class."[23] Although the cases adopting this approach recognize there will be varying individual factual circumstances, they hold that this does not defeat a class action, as it is not necessary that the common facts dispose of the entire litigation.

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[20] *Id.*

[21] 2 FEP Cases 339 (D.N.M. 1969).

[22] 398 F.2d 469 (5th Cir. 1968).

Although the prevailing view seems to be the "across the board" theory, there has been some disagreement with that approach, and one court has specifically rejected it.[24]

Even among the courts that have adopted this approach there has been disagreement as to how far it can be extended. Several courts have held that there is a common question of fact as to such conditions as segregated comfort facilities, the elimination of which would involve only injunctive relief. However, these courts have also held that there is no common question of fact as to specific past acts of individualized discrimination such as refusal to hire or promote or discriminatory discharge as redress for these wrongs would require affirmative relief.[25] This did not pose a stumbling block to the court in *Manning v. General Motors Corp.,*[26] holding that such individual matters could be handled by a special master appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure.

Although the Fifth Circuit Court of Appeals has adopted the "across the board" approach, it has also recognized that there may be some issues that are not common to the entire class and if so, the trial court may utilize sub-classes with each co-plaintiff representing the subclass that would have issues of fact or law common to him.[27] The weakness of this approach is that it requires co-plaintiffs, and these may be unattainable. However, it is more in conformance with the requirements of Rule 23 (a) (2) than the special master approach utilized in *Manning* and affords more protection to absent class members.

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[23] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966). For other cases adopting this approach, *see* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971); Wilson v. Monsanto Co., 315 F. Supp. 977 (E.D. La. 1970); Younger v. Glamorgan Pipe and Foundry Co., 310 F. Supp. 195 (W.D. Va. 1969); Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D. N.C. 1969); Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd per curiam,* 423 F.2d 57 (5th Cir. 1970), *cert. denied,* 400 U.S. 951 (1970).

[24] Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970).

[25] Kemp v. General Elec. Co., 1 FEP Cases 723 (N.D. Ga. 1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

[26] 3 FEP Cases 104 (N.D. Ohio 1971).

[27] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Oatis v. Crown Zellerbach, Inc., 398 F.2d 496 (5th Cir. 1968).

Although most of the cases in which the "across the board" approach has been applied have alleged discrimination on the basis of race, the same reasoning, i.e., race discrimination is class discrimination, has been extended to sex discrimination cases[28] and can just as well be extended to those cases alleging religious or national origin discrimination.

C. Typical Claims or Defenses

The requirements of Rule 23 (a) (3) that the claims or defenses of the representative be typical of those of the class is usually glossed over by the courts, especially those that adopt the "across the board" approach. Generally these courts reason that if individual differences in the issues of fact do not defeat the class action, neither do individual differences in the claims for relief. In *Hyatt v. United Aircraft Corp.,*[29] cited previously as rejecting the "across the board" concept, the court pointed to the individual differences in claims and held that the requirement set forth in Rule 23 (a) (3) was not met.

D. Adequacy of Representation

The "across the board" approach, which seems to be the prevalent theory, has some obvious advantages.

The plaintiff can attack a pattern of discrimination and the variety of forms in which it appears without the necessity of combining with others who may be reluctant to join him, and through the class action he can join others without the necessity of their pursuing Title VII remedies themselves. Thus, if he is of a chivalrous nature he can help a large number of others similarly situated who may be too docile to help themselves. At the very least this approach enhances the plaintiff's bargaining power with the defendant during litigation or even prior to instituting suit by the mere threat of bringing a broad class action.

However, the area of concern is the absent class members. These persons benefit if the plaintiff wins by being freed from the thralldom of discriminatory practices and policies without having to emerge and carry the banner. However, as was recognized by the court in *Williams v. American Saint Gobain Corp.*[30] if the plaintiff succeeds in eliminating racially discriminatory policies, the benefits are enjoyed by others similarly situated regardless of whether they were joined as class members. Nevertheless, there are undoubtedly some situations where discrimination victims would benefit more by being included in a class suit. For example, an aggrieved person may be too docile to institute Title VII proceedings himself, but once they are instituted he may join in the litigation for affirmative relief purposes.

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[28] Manning v. General Motors Corp., 3 FEP Cases 104 (N.D. Ohio 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[29] 50 F.R.D. 242 (D. Conn. 1970).

[30] 1 FEP Cases 586 (E.D. Okla. 1968).

What if the plaintiff wins (or loses) his individual case, and because of his inadequacies as a class representative loses the class action portion of the case? It is this possibility that Rule 23 (a) (4) seeks to prevent by requiring that the representative of the class fairly and adequately protect the interests of the class. The courts have not dealt directly with this requirement in very many cases and among those courts which have specifically dealt with it, the opinions are diverse.

In *Burney v. North American Rockwell Corp.,*[31] a discriminatory discharge case, the court said it could neither assume that the plaintiff would fairly and adequately represent the interests of other Negroes who were discriminated against in such areas as job assignments, overtime, or vacations nor since the plaintiff had not been an employee for two years, that he would fairly and adequately represent current employees in the broad area of discriminatory work rules and terms and conditions of employment.

Another court, resolving this issue of adequacy of the class representation, stated that the other members of the class had selected the plaintiff as their representative[32] and thus demonstrated their faith in her ability to adequately and fairly represent them. The court held she was an adequate representative notwithstanding that her claim was not identical with the claims of all class members.[33]

Yet another court, in determining the question of adequate and fair representation, stressed the lack of collusion between the plaintiff and the defendant and the experience of plaintiff's counsel in handling racial matters.[34]

The most piercing analysis of the requirement that the plaintiff be a fair and adequate representative has come from the Fifth Circuit. Justice Godbold pointed out that "an over-broad framing of the class may be so unfair to absent class members as to approach, if not amount to, deprivation of due process."[35]

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[31] 302 F. Supp. 86 (C.D. Cal. 1969), *accord,* Bradley v. Southern Pacific Co., Inc., 51 F.R.D. 14 (S.D. Tex. 1970); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970); Baxter v. Savannah Sugar Refining Corp., 46 F.R.D. 56 (S.D. Ga. 1968).

[32] However, it should be pointed out that consent of class members is not necessary to the maintenance of a class action. Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970).

[33] Manning v. General Motors Corp., 3 FEP Cases 104 (N.D. Ohio 1971).

[34] Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971).

Thus, if the plaintiff through his inadequacies as a representative loses on the allegations he raises, then the absent class members will have gained nothing, but will have lost their right to relief through their own action because of the doctrine of *res judicata.*

III. The Relief That May be Granted

Although *Oatis v. Crown Zellerback Corp.,*[36] settled the question, at least in the Fifth Circuit, of whether each class member must pursue his remedies before the EEOC (by holding that each member need not), there remains the question of what relief may be granted those class members who have not pursued their EEOC remedies.

There is little doubt that they are entitled to injunctive relief, but what of affirmative relief? Some courts have held they are not so entitled,[37] and others have held they are entitled to affirmative relief.[38] The latter mentioned cases are more soundly reasoned, especially *Madlock v. Sardis Luggage Co.,*[39] in which the court emphasized the duty the Act places upon the court to protect the interest of the public as well as that of the parties. Envisioned purposes of the Act are accomplished only when relief is afforded the plaintiff and all the class members. The court, using the *Miller, Jenkins,* and *Oatis*[40] decisions for its foundation, held that once a class member enters the case as a co-plaintiff, he does so on the same basis as the original plaintiff.

Aside from the reasoning in *Madlock,* it would be anomalous to say that a class member does not have to pursue his Title VII remedies in order to be included in the class, and then hold that if he does not he cannot obtain affirmative judicial relief. Such persons could not obtain relief since if they tried to re-litigate the same issues that were litigated in the class action in order to obtain affirmative relief, the defendant could raise the doctrine of *res judicata* as a defense.

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[35] Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969).

[36] 398 F.2d 496 (5th Cir. 1968).

[37] Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49 (S.D. Ga. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

[38] Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Madlock v. Sardis Luggage Co., 302 F. Supp. 866 (N.D. Miss. 1969).

[39] 302 F. Supp. 866 (N.D. Miss. 1969).

[40] Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Jenkins v. United Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

CONCLUSION

The court decisions discussed above have established an outline for Title VII class actions. However, there are some areas in which the law is still evolving on a case by case basis. Examples are the extent of allowable expansion of the issues raised before the EEOC and what issues are or are not common to the entire class. How broad the class may be and still insure adequate representation is also an unsettled question.

At the present stage of development it may reasonably be concluded that Title VII provides that an aggrieved person may file an EEOC charge, wait sixty days, and demand from the EEOC his right to sue letter. Within thirty days thereafter, he may institute suit on behalf of himself and those similarly situated in the form of a class action. Both on his own behalf and on behalf of the class he is allowed to raise those issues which are reasonably related to and grow out of the issues raised before the EEOC. He may represent a class meeting the Rule 23 requirements. If there are questions of fact or law which are not common to the entire class, the trial court may utilize sub-classes or a special master. Injunctive relief will be granted to absent class members and affirmative relief can be granted to those class members who prove they are so entitled, regardless of whether they pursued their remedies before the EEOC.

Although the class action device is a useful tool in Title VII cases, the courts should heed the caveat not to expand the class action to the detriment of those it is seeking to help. What the court must do is make a compromise between the right of the plaintiff to bring the class action, the right of the defendant to adequately defend the law suit, the right of the court to manage the law suit and the right of the absent class members to have a representative that will fairly and adequately represent them.

Author's note: Subsequent to the submission of this article, Congress passed an amendment to Title VII known as the Equal Employment Opportunity Act of 1972, which was signed by the President on March 24, 1972, the effective date thereof. The major changes in Title VII insofar as this article is concerned are the granting of enforcement powers to EEOC and changes in the time periods applicable thereunder. Under the amendment, in cases where reasonable cause exists to believe a violation of the Act has occurred, the EEOC, or the U. S. Attorney General in cases involving states or their political subdivisions, if unable to obtain conciliation acceptable to the EEOC, may within

30 days subsequent to the filing of the charge institute an action in Federal District Court. The charging party can intervene in such action. If the EEOC, in cases where it has found reasonable cause to believe a violation of the Act has occurred, has not filed a civil action within 180 days from the filing of the charge or, if the EEOC dismisses the charge, the charging party is notified and may personally bring an action within 90 days thereafter. Under the amendment, the time for filing a charge is extended from 90 to 180 days from the date the alleged unlawful employment practice occurred, and the time for instituting a court proceeding by a charging party is extended from 30 to 90 days from notification by the EEOC.

This article, of course, will be applicable as written in all court actions filed under the original Act. It will retain its vitality in cases instituted under the amended Act since class actions will still be permitted. Also, the author foresees a substantial transition period for the EEOC, especially in view of the EEOC's bulging backlog of cases and undermanned staff. Therefore, a number of private actions should continue to be brought in the foreseeable future.

PRACTICE AND PROCEDURE IN MISSISSIPPI: AN ANCIENT RECIPE FOR MODERN REFORM

*Lawrence J. Franck**

> There is enough latent energy in the courts . . . to generate a power which will purge and dignify the legal profession not for one year only, but for all time . . . enough "inherent judicial power" to raise that profession from the place of public criticism to which it has been consigned, to that high and honorable position in public esteem which is its natural and historic birthright.[1]

To a great many Mississippi trial practitioners, the regulatory scheme of pleading and practice in Mississippi courts is a constant source of frustration. Antiquated and ill-designed for use in modern trial practice, the present hodge-podge of confusing, scattered statutes, court rules, and case decisions which embody our practice and procedural rules are sadly in need of a carefully studied and thorough reworking. From time to time there have been some minimal efforts at reform of specific deficiencies[2] and calls for a more modern, efficient system,[3] but the efforts at reform have been largely unsuccessful.[4] Indeed, there have been no significant developments in Mississippi practice and procedure for nearly half a century.[5]

The purpose of this paper is to propose a means by which the procedural aspects of Mississippi court practice can be overhauled and constantly kept in good working order. The paper assumes that there is a basic consensus on the need for such reform and does not seek to make a case for that need.[6] The proposal is a simple one: The Mississippi Supreme Court, as the state's highest judicial organ and a body constitutionally vested with the "judicial power"[7] of the state, has inherent power to establish by appropriate rules the practice and procedure which shall govern the course of litigation in the courts of Mississippi.

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[1] Dowling, *The Inherent Power of the Judiciary,* 21 ABAJ 634 (1935).

[2] *See, e.g.,* Griffith, *The New Mississippi Civil Practice Act — Its Background and Effect,* 20 Miss. L.J. 1 (1948).

[3] Triplett, *Hocus Pocus Legal Procedure,* 16 Miss. L.J. 9 (1943); Fant, *Procedural Reform in Mississippi,* 34 Miss. L.J. 40 (1963); Ethridge, *Improving the Machinery of Justice,* 37 Miss. L.J. 506 (1966); Patterson & Patterson, *A Plea For Procedural Reform in Mississippi,* 42 Miss. L.J. 293 (1971).

[4] Fant, *supra* note 3, at 40.

[5] Ethridge, *supra* note 3, at 508.

[6] *See* Patterson & Patterson, *supra* note 2, for a catalogue of deficiencies which cry out for reform of the entire system.

Heretofore Mississippi practice and procedure has been largely regulated by statute,[8] and most efforts at reform have been expressed in terms of statutory improvements.[9] Occasionally suggestions have been put forth for the "vesting" of the rule-making power in the Supreme Court,[10] but the proponents of these suggestions have always considered that such a step requires a constitutional amendment specifically vesting such power in the court,[11] or a statute authorizing the court's assumption of the rule-making function.[12]

As was stated above, the thesis to be advanced here is that the court inherently possesses the power to establish rules of pleading, practice, and procedure; consequently, there is no need for a constitutional amendment or even a statute "vesting" it with that power. The power has been dormant for quite a long time; so it might be argued that the court has abdicated its rule-making prerogative in favor of legislative pre-emption of that field. Historically and analytically, however, the power is the court's. It can and should retrieve that power.[13]

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[7] MISS. CONST. art. 6, § 144 (1890).

[8] Court rules and case decisions have largely been used to fill voids left in the statutory scheme. *See, e.g.,* Miss. Supreme Court Rules; Uniform Rules For the Circuit Courts of Mississippi (1971).

[9] *See, e.g.,* the reports of various study committees of the Mississippi State Bar Association reported in 35 MISS. L.J. 546-547 (1964); 37 MISS. L.J. 600-601 (1966); 38 MISS. L.J. 594 (1967). But even these suggested improvements have not always been well received, even by the Bar itself. In 1967 the recommendations of the study committee were not adopted by the Bar. 38 MISS. L.J. 594 (1967).

[10] A Bar committee rejected such a proposal in 1944, preferring to keep the rule-making function in the legislature, on the dubious grounds that this would be more "democratic." 16 MISS. L.J. 335, 336 (1944). *See* Ethridge, *supra* note 3.

[11] Ethridge, *supra* note 3.

[12] In 1949 the Committee on Procedural Reform reported to the Bar that it recommended passage of a statute "vesting in the Supreme Court of . . . Mississippi the power to prescribe . . . general rules of pleading, practice, and procedure in civil cases in the chancery, circuit, and county courts of the state. . . ." 20 MISS. L.J. 507 (1949).

In its report, the short-lived Judiciary Commission took the same approach. It recommended passage of a specific statute which would provide: "The Supreme Court shall have the power to prescribe from time to time, by general rules, the forms of process, writs, pleadings, motions, rules of evidence, and the practice and procedure of the circuit, chancery, and county courts of this State in civil actions." *Report of the Mississippi Judiciary Commission,* app., 18 (1970). The report also noted that "[p]leadings, practice and procedure should be designed . . . to get to the true and controlling issues in cases, to ascertain the facts which determine the law, and to reach a prompt decision." *Id.* at 15.

No attempt will be made herein to survey all of the numerous court decisions which have considered one aspect or another of judicial regulation of court practice and procedure.[14] Since this paper is frankly designed as a polemic, its purpose will be to demonstrate the validity of its stated position.

I. SOURCES OF THE RULE-MAKING POWER: HISTORY AND ANALYSIS

In England the power to establish rules of practice and procedure has gone through several distinct and well-defined stages of development. In its earliest stages pleadings were oral, and other matters of practice and procedure were established gradually according to the prevailing custom in the court. Later more formal rules were established by the courts to govern procedure in cases before them.[15] Still later the legislative arm of the government began to assert control over court procedure, but by the time of the adoption of most American state constitutions, the power in England had been restored to the courts.[16]

In America much emphasis was placed upon the division of powers among the several branches of the government, and it was insisted that each branch remain free from intrusions upon its perogatives by either of the other governmental arms. The Mississippi Constitution follows this familiar pattern. Thus it provides:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[17]

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[13] How this might be accomplished is considered in section IV., *infra.*

[14] *See* Annot., 110 ALR 22 (1937), 158 ALR 705 (1945).

[15] No formal rules of practice existed earlier than the Fourteenth Century. Prior to that they were established only by court decision in particular cases. Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures,* 22 A.B.A.J. 772, 773-74 (1936).

[16] Pound, *The Rule-Making Power of the Courts,* 12 A.B.A.J. 599 (1926). Dean Pound suggests several reasons for these historical developments in England, which, for purposes of this paper, are largely academic.

[17] MISS. CONST. art. 1, § 1 (1890).

And again:

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.[18]

These provisions have been a part of the Mississippi constitutional fabric from the beginning.[19]

Since our fundamental notions of law have been drawn from our parent realm, England,[20] it is important that we look to the situation that existed in that country at the time of the adoption of the American constitutions in order to determine where, according to the principles prevailing there, the rule-making power had its source.[21] It is clear that at the time of the adoption of our own constitutions, the power to make rules of practice "was and had been for centuries in the King's courts at Westminster."[22] Those were circuit courts, but the practice established by the judges at Westminster was followed wherever the courts were held.[23]

That the English courts freely regulated their own practice by rules established by them may be clear. But what can be said with respect to the exercise of regulatory authority by a soverign's highest court over the practice in constitutionally inferior courts? Again, it seems that history is decisive. In England the practice of courts of assize and nisi prius was governed by general rules established by the courts at Westminster, even though the former were independent court systms.[24]

From the foregoing it seems certain that when the Mississippi constitutions were adopted, the long settled practice in England was that the rule-making power was a judicial one.[25]

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[18] MISS. CONST. art. 1, § 2 (1890).

[19] MISS. CONST. art. 2 §§ 1 & 2 (1817); MISS. CONST. art. 2, §§ 1 & 2 (1832); MISS. CONST. art. 3 § 1 (1869).

[20] GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 1 (2d Ed. 1950).

[21] The dividing line among the several governmental powers for determining the proper source of a particular power is largely determined by historical criteria. Pound, *supra* note 15, at 601.

[22] *Id.* at 601.

[23] *Id.*

[24] *Id.*

[25] A somewhat different perspective is presented in Tyler, *supra* note 15 at 773-74 (1936). The argument is there advanced that since in England *all* power ultimately rested in the King, the English governmental system was "one of fused and not divided powers." *Id.* at 773. Further, since it appears that in establishing rules having general effect, "it was . . . occasionally necessary to resort to acts of parliament. . . ." *Id.* at

Despite these historical imperatives, the early American experience was largely a resort to legislative action for the establishment of practice and procedure in the courts. Dean Pound has suggested several reasons for this development.[26] Prior to the Civil War the prevailing notion in America was one of legislative supremacy. Because they were conceived (and conceived themselves) as wielding "the general powers of the sovereign people,"[27] legislatures were prone to assume that "whatever the sovereign people could do, by virtue of their sovereignty, they could do through legislation."[28] Thus, even though the constitutional imperatives of a separation of powers was formally embodied in most, if not all, constitutions, in practice the legislature was looked upon as supreme. For this reason, Dean Pound suggests, as pressures for procedural reform emerged, it was natural to look in the direction of legislative action.[29]

Moreover, the early system of legal education in this country was basically a system of apprenticeship. That system was "before all else a training in the details of local procedure."[30] Since this form of legal education led lawyers to attach primary importance to the procedural, rather than the substantive, aspects of the law, it was natural for them to expect the legislature to control the procedural aspects of the law as well as its substantive provisions.[31]

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773. One must "hesitate to exclude the legislature constitutionally from all participation in creating rules of practice." *Id.* at 774

The point, however, is not *how* English courts came to the power; but rather, that when the American (and Mississippi) constitutional systems evolved, they drew on the English practice *as it then existed.* And at that time, it was established that in England, procedural rule-making was a judicial function.

[26] Pound, *supra* note 16.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 600.

[30] *Id.* at 600-01.

[31] *Id.* at 601. *See* Tyler, *supra* note 15. It is there argued that as pressure for modernization of court procedures mounted in America, there was, unlike in England, no "centralized bench and bar at which to point an accusing finger." Tyler, *supra* note 15, at 775.

It has been stated that the adoption by the legislative branch of codes of practice and procedure for the judicial branch shows "either that the courts have abdicated their rule-making power and surrendered it to the Legislative Department of Government, or that the Legislative Department has reached out and appropriated the power regardless of the court's desire in the matter." Marvel, *Some Problems of Bench and Bar,* 2 Miss. L.J. 188, 191 (1929).

In Mississippi the common law rules of pleading were unchanged by the state's first legislative code.[32] However, lawyers of the day were apparently adroit at using the common law practices for all sorts of dilatory tactics to the extent that it "never seemed to occur to them once as a possible conception" that "justice had anything to do with trying cases."[33] By 1850 the call had been sounded for reform of these procedures. The governor called for the abolition of common law forms of actions, pleading, and practice because "[t]he administrations of justice in our circuit courts is, in my opinion, greatly impeded and rendered litigious and burdensome" by those practices.[34] The result was the adoption of Chapter 4, Laws of 1850, which charted a new course in the rules of pleading in this state.[35] Thus, Mississippi showed itself susceptible to the philosophy of the day,[36] and the control of practice and procedure in our courts has been principally a matter of legislative concern since that time.

There was a similar historical development in regard to equity practice. Originally the practice involved petitions addressed directly to the king and later to his chancellors.[37] The chancery courts developed their own processes and borrowed others from the common law and the civil law.[38] Chancery courts established in colonial America adhered closely to the rules and practices prevailing in their counterparts in England.[39] Moreover, the American courts of equity relied heavily upon the practice announced by Chancellor Kent of New York for their procedural processes.[40]

Judge Griffith points out that in Mississippi the chancellors, "after setting forth, as the procedure of the court, those particular rules required by our own separate situation,"[41] specifically provided by rule that the mode of procedure should conform to the practice in New York's equity courts wherever feasible.[42]

Until 1856 the body of rules of practice in Mississippi chancery courts, other than those taken from the practice in New York and from the English practice, "were prescribed and promulgated by the chancellor."[43] In that year, however, a constitutional amendment placed the exercise of chancery jurisdiction in the circuit judges of the state, and it was therefore "deemed essential to carry the rules into formal statutes."[44] Since then, the rules of chancery practice and procedure have been largely established and perpetuated by legislation.[45]

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[32] Griffith, *supra* note 2.

[33] Baldwin, *The Bench and the Bar,* as quoted in Griffith, *supra* note 2, at 2.

[34] Griffith, *supra* note 2, at 3.

[35] *Id.* at 4-5.

[36] Pound, *supra* note 16.

[37] Griffith, *supra* note 20, at §§ 6, 7, 9.

[38] *Id.* § 10.

[39] *Id.* § 12.

[40] *Id.* § 15.

[41] *Id.*

[42] *Id.*

This brief review shows that legislative control of the rule-making function runs counter to the heritage to which we profess adherence and from which we claim inheritance. Curiously, too, the American experience of legislative rule-making for the judicial arm was in the ascendancy at precisely the time that in England the legislature had returned the power to the courts.[46]

Dean Pound has persuasively argued that, analytically, there is no rational basis for legislative control of the rule-making power.[47] There is no more reason to support legislative control of court procedure than there would be to support court supervision of the procedure by which the executive branch discharges its duties.[48] In Mississippi one can imagine the furor which would result if the court announced its promulgation of rules governing the manner in which committees of the legislature should carry out their affairs or proclaimed its amendment of the rules of parliamentary procedure by which the legislative branch operates. Yet that is precisely the situation that exists in this state in regard to judicial procedure. The legislature has assumed practically full control of the internal procedures by which the courts administer justice. The astonishing fact is that this usurpation of judicial power by the legislature has been meekly accepted for so long. Particularly is this so in light of the explicit command of the constitution that the division of powers between the several arms of government shall not be breached.[49] For a people whose traditions have evoked such emotional outrage over real or imagined usurpations of power by one branch of government over another in other spheres, it is little less than incredible that we should have so long endured the legislature's unwarranted assumption of what is, on historical and analytical bases, a clearly judicial function.

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[43] *Id.* § 20.

[44] *Id.* Surely the philosophy undergirding that development was the same as that described by Dean Pound, *supra* notes 26-30.

[45] Griffith, *supra* note 20, at §§ 20, 20a, 20b, 20c. There are, of course, numerous matters pertaining to chancery practice and procedure for which there is no specific legislative basis and which rest upon the judicial procedures established long ago. *See generally* Griffith, *supra* note 20.

[46] Pound, *supra* note 16.

[47] *Id.* at 601.

[48] *Id.*

[49] Miss. Const. art. 1, § 2 (1890).

II. Sources of the Rule-Making Power: Reform and Return

Despite the early history of the rule-making power in America, recent years have witnessed a trend toward restoration of that function to the courts.[50] The arguments in favor of its residence in the hands of the judiciary have been persuasive. Nevertheless, because of the diverse ways in which this return has been accomplished, the basic question of power—the power to make rules of procedure for the judicial branch of the government—remains the core question.[51]

Obviously the state constitution must be the foundation upon which the source of that power rests.[52] In some states reform has come by means of an express constitutional grant of the rule-making power to the judiciary.[53] In other states legislation has been enacted for this purpose,[54] or the courts have assumed the function by invoking their inherent power.[55] But it will not suffice simply to categorize the status of the rule-making power in this fashion. Because a number of courts have given their attention to this question in a variety of situations, an analysis of some of these decisions is important to the development of the position advocated herein.

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[50] Annot., 158 A.L.R. 699, 702 (1945). In twenty-four states the highest court has complete supervisory power to establish rules of civil procedure. In other states there is a conglomeration of categories into which the rule-making power may fall. In some the court may initiate rules which must have legislative approval to become effective; in others the court-made rules become effective unless the legislature disapproves them; in still others the legislature has the right to repeal or modify such rules. *See* Report No. 13, The American Judicature Society, "The Judicial Rule-Making Power in State Court Systems." The Report points out that in a minority of states the legislature must still initiate changes in rules of procedure, while in others the court cannot supervise procedural rules in inferior courts. Significantly, Mississippi is one of only three states where there is little or no centralization of rule-making power. It is this void that this paper advocates our Supreme Court should fill.

[51] Note, *The Judiciary and the Rule-Making Power,* 23 S.C.L.R. 377 (1971).

[52] 21 C.J.S. *Courts* §§ 120, 122.

[53] *See, e.g.,* HAWAII CONST. art. V, § 6, discussed in Lucas v. Liggett & Myers Tobacco Co., 461 P.2d 140 (Hawaii 1969); N.J. CONST. art. VI, § 2 ¶ 3. Under that provision the Court held in Lichter v. County of Monmouth, 114 N.J. Super. 343, 276 A.2d 382 (1971), that "there is no room for divided authority" between the judiciary and the legislature as to the rule-making power. *See* ARIZ. CONST. art. VI, § 5; State v. Meek, 8 Ariz.App. 261, 445 P.2d 463 (1968); COLO. CONST. art. VI, § 21; FLA. CONST. art. V, § 3; MICH. CONST. art. VI, § 5; N.J. CONST. art. VI, § 2.

[54] *See, e.g.,* Petition of Florida State Bar Ass'n., 155 Fla. 710, 21 So. 2d 605 (1945); Pan American Petroleum Corp. v. Texas Pac. Coal and Oil Co., 340 S.W.2d 548 (Tex. 1960); *In re* Constitutionality of Section 251.18, WISC. STATUTES, 205 Wis. 41, 236 N.W. 717 (1931).

[55] Nasif Realty Corp. v. Nat'l. Fire Ins. Co., 107 N.H. 267, 220 A.2d 748 (1966); Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961).

The constitutional underpinning for the assertion of an *inherent* power in the judicial branch to assume the rule-making function rests upon the separation of governmental powers. It has been stated that this is the most cogent argument which supports this position.[56] Thus, in *Craft v. Commonwealth*[57] the Kentucky court stated:

> It has generally been recognized that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice.
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> * * * *
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> When we say that an express constitutional grant of rule-making power is unnecessary we do not mean that the rule-making power does not flow from that instrument. The fountain source of that power is in the act of division of powers among the three branches of the government. . .and the grant of judicial power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice.[58]

The court also stated:

> Thus, the circuit court and this court have the power to formulate rules for the fair administration of justice aside from additional grant or limitation by the legislature.[59]

In the earlier decision of *Burton v. Mayer,*[60] the Kentucky Supreme Court had recognized that there is an area of *coöperation* between the legislative and the judicial branches of government, such that the courts are willing to accept legislative assistance in making the judicial process more effective. The Kentucky Court was not willing to accept, however, "the right of legislative *dominance* in matters of this kind."[61]

So long as rules of practice fixed by the legislative branch accord with the proper and effective administration of justice, the court was willing to accept them. But where legislative enactments in this field impede the administration of justice or prove unworkable "the duty undoubtedly rests on the courts to draw upon the reserve of their inherent power, not in the assertion of a domination over other co-ordinate branches of government, but in co-operation with the legislative and executive branches to carry out the purposes of the constitution."[62]

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[56] *The Judiciary and the Rule-Making Power, supra* note 51 at 382.

[57] 343 S.W.2d 150 (Ky. 1961).

[58] *Id.* at 151.

[59] *Id.* at 152.

[60] 274 Ky. 263, 118 S.W.2d 547 (1938).

[61] 118 S.W.2d at 549.

Perhaps no court has stated the inherent judicial power in as forceful terms as has the New Hampshire court. In *Garabedian v. Donald William, Inc.*[63] that court held that "the inherent rule-making authority of courts. . .to prescribe rules of practice. . .has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents."[64]

The Arizona constitution specifically vests the rule-making power in the judiciary,[65] but, the Arizona court has recognized its inherent power even without that express grant. In *Heat Pump Equipment Co. v. Glen Alden Corp.*[66] it was held:

> Rules of practice and procedure governing the courts have been considered in this State to be essentially judicial in nature, with the power to make them inherent in the courts on the basis of the State Constitution which distributes the powers of government among the legislative, executive and judicial departments. . .and vests the judicial power of the state in the courts.[67]

Discussion of the relative roles of the legislative and judicial branches in regard to judicial administration has arisen in a number of cases involving legislation transferring the rule-making function to the courts. It is an anomaly that many of these statutes have been attacked on the premise that they involve an unconstitutional delegation of *legislative* authority. Such attacks have uniformly been rejected. One of the leading decisions in this regard is *In re Constitutionality of Section 251.18,* Wis.

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[62] *Id.* at 549-50.

[63] 106 N.H. 156, 207 A.2d 425 (1965).

[64] 207 A.2d at 426. This same language was employed in Nasif Realty Corp. v. Nat'l. Fire Ins. Co., 220 A.2d 748, 749 (N.H. 1966); and in Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961), it was stated that "[i]rrespective of legislation, the rule-making power is in the courts." 169 A.2d at 656. Just recently, the New Hampshire court has stated that its general superintendence of the courts of that state rests upon its common law powers; the statute concerning its supervisory control merely "confirms" its inherent powers. *In re* Mussman, 286 A.2d 614 (N.H. 1972).

[65] ARIZ. CONST. art. VI, § 5.

[66] 93 Ariz. 361, 380 P.2d 1016 (1963).

[67] *Id.* at 1017.

Statutes.[68] A Wisconsin statute provided that the supreme court should promulgate rules of pleading, practice, and procedure in all courts of the state. The statute was attacked as being an unconstitutional delegation of the legislative power. In discussing the separation of powers, the court said:

> It is, of course, elementary that we are committed by Constitution to the doctrine of separation of powers. It is also fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch.[69]

The court recognized that it is practically impossible to maintain an absolutely pure division of these powers among the several branches of government.[70] It also held that what constitutes the judicial power "is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution."[71] After reviewing the history of Wisconsin's constitutions, the court held:

> From the foregoing, it is concluded that the power to regulate procedure, at the time of the adoption of the Constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power, and that there is no constitutional objection to the delegation of it to the courts by the Legislature.[72]

Other courts, discussing somewhat similar statutes, have stated even more strongly the inherently judicial nature of the rule-making power. In *State v. Roy*[73] the Supreme Court of New Mexico held that such a statute was a "mere abdication or withdrawal from the rule-making field" by the legislature, and that such statute was "not a delegation of power."[74]

In like manner, a statute authorizing the Supreme Court of Idaho to prescribe general rules of practice and procedure for all courts in the state was held in *R.E.W. Construction Co.* v. *District Court of Third Judicial District*[75] not to be a delegation of power. The court said:

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[68] 204 Wis. 501, 236 N.W. 717 (1931).

[69] *Id.* at 718.

[70] *Id.*

[71] *Id., citing* State v. Harmon, 31 Ohio St. 250 (1878).

[72] 236 N.W. 717, 720-21 (1931). The Court cited Hanna v. Mitchell, 202 App.Div. 504, 196 N.Y.S. 43, 51 (1922), where is was said: "The power to make rules governing the practice and procedure in the courts is a judicial, and not a legislative, power."

[73] 40 N.M. 397, 60 P.2d 646 (1936).

[74] 40 N.M. 397, 60 P.2d 646, 660 (1936). The court further stated that "Whether the legislative branch of the government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not be now determined." *Id.* To the same effect is Burney v. Lee, 59 Ariz. 360, 129 P.2d 308 (1942).

> It is thus our conclusion that the legislature in enacting the provisions of Chapter 90, Session Laws of 1941, was not delegating legislative power to the Supreme Court, but as is stated in the first section of the act, *the legislature was recognizing the inherent power of the Supreme Court in the area of rule-making procedure in all courts.*[76]

The rationale of these and similar decisions is clear. When the constitution places the judicial power in the judicial branch of the government, that grant of judicial power carries with it the right to make that power effective, and this includes the adoption of rules of practice and procedure[77] at least for constitutional courts.[78] This is primarily a judicial function.[79]

In *Adams* v. *Rubinow*[80] the Connecticut court drew a sharp distinction between the legislature's right to establish rules for statutory courts and the court's power to govern constitutional courts.

> The effect of the development in the understanding of the true meaning of the constitutional provision for separation of powers. . .as far as rule making is concerned, is that the General

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[75] 88 Idaho 426, 400 P.2d 390 (1965). The Idaho constitutional provisions are strikingly similar to our own. IDAHO CONST. art. 2 § 1.

[76] 88 Idaho 426, 400 P.2d 390, 397 (1965). *See also* Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 403 P.2d 859 (1965). The court again characterized the statute as a recognition of "the inherent power of the Supreme Court to make rules governing procedure in all courts of this state. . . ." *Id.* at 860.

In McCormick v. Vigo County High School Building Corp., 226 N.E.2d 328 (Ind. 1967), the court referred to its "inherent power" and said of such a statute that its purpose was to "remove any apparent conflict" between the judicial and legislative power. *Id.* at 330.

[77] Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938).

[78] Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968). *See The Judiciary and the Rule-Making Power, supra* note 51 at 380, n. 9.

[79] *In re* constitutionality of Section 251.18, Wis. Stat., 204 Wis. 501, 236 N.W. 717 (1931); Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); People v. Loeb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959): "This court has *inherent power* to make rules governing the practice in inferior courts. . . . The inherent power of courts to make suitable rules consistent with constitutional safeguards is universally recognized." 161 N.E.2d at 332 [emphasis added]. Indeed Dean Wigmore has taken the position that any legislative attempt to regulate court procedure is absolutely void. Wigmore, *All Legislative Rules For Judiciary Procedure are Void Constitutionally,* 23 ILL. L.REV. 276 (1929). He there argues that the "general (judicial) power is a power to do all that courts have to do, i.e., a power to regulate their own procedure." 23 ILL. L. REV. at 277.

[80] 157 Conn. 150, 251 A.2d 49 (1968).

> Assembly has no power to make rules of administration, practice or procedure which are binding on either of the two constitutional courts and that any attempt on its part to exercise such power is dependent for its efficacy, upon the acquiesence of the the constitutional court involved.[81]

But as regards courts which the legislature has constitutional authority to establish (or abolish):

> The General Assembly has the power to make reasonable rules of administration, practice and procedure provided that they do not significantly interfere with the orderly operation of the court while it remains in existence as a court.[82]

While the legislature in Mississippi has undertaken the control of practically all aspects of the practice and procedure of the constitutional and statutory courts, the supreme court has not hesitated in its decision to graft its own notions of proper practice upon the statutory language. Thus, while the statute governing declarations in circuit court requires only that the pleading contain a "statement of the facts . . . in ordinary and concise language,"[83] the court has adhered to the common law rule which prohibited the joinder of actions sounding in tort and in contract.[84] Likewise, although the governing statutes seem patently clear in providing that when the venue is improper, the court should transfer the case to a proper county upon the application of *any* defendant,[85] the court has vacillated on the question whether corporations have a right to a change of venue.[86] Numerous other examples could be cited but these are specifically noted only to illustrate the point.[87]

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[81] *Id.* at 56.

[82] *Id.* The distinction is important. Under the federal constitution, the judicial power is vested "in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Thus, under the rationale of *Rubinow,* it is clear why it required congressional action to authorize the Supreme Court to promulgate the Federal Rules of Civil Procedure. *See* Wayman v. Southard, 22 U.S. (10 Wheat.) 1 (1825). *Cf.* Harris v. Nelson, 394 U.S. 286 (1969).

[83] Miss. Code Ann. § 1464 (1956).

[84] Town of Hazlehurst v. Cumberland Tel. and Tel. Co., 83 Miss. 303, 35 So. 951 (1904). *See* Casey, *The Form and Content of Pleadings,* 30 Miss. L.J. 373, 382 (1959).

[85] Miss. Code Ann. §§ 1433, 1441 (1956).

[86] Prior to the enactment of § 1441, the Court held that a corporation had no right to a change of venue. Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916); Morrimac Veneer Co. v. McCalib, 129 Miss. 671, 92 So. 817 (1922). After the statute was enacted, the court ignored it, adhering to the old rule, Forman v. Miss Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); Ainsworth v. Blakeney, 232 Miss. 297, 98 So. 2d 880 (1957), until the decision in New Biloxi Hospital v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962), where the statute was correctly applied. Later, the court reverted to its earlier rule in Miss. Rice Grower's Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399 (Miss. 1966), which did not even mention either the statute or *New Biloxi.*

More importantly, two significant decisions of the Mississippi Court clearly show that it is closely attuned to its inherent power in the rule-making field. In *Gulf Coast Drilling & Exploration Co.* v. *Permenter*,[88] the court considered the validity of a circuit court rule requiring briefs on appeals from the Workmen's Compensation Commission to be filed within a certain time. It was argued that since the statute[89] authorized the circuit court only to affirm or remand such appeals, the court had no authority to dismiss an appeal for failure to follow its procedural rules. Rejecting that contention, the court held that the circuit court had "ample constitutional, statutory and inherent powers"[90] to establish such rules.

> We hold that the circuit courts are intermediate courts of appeal in workmen's compensation cases just as they are in county court cases. As such they are governed by the same rules and *endowed with the same powers applicable to courts of appeal under appellate tradition*.[91]

Permenter was based largely on the court's decision in *Southern Pacific Lumber Company* v. *Reynolds*.[92] That case involved the validity of a similar circuit court rule governing appeals from county court. In upholding the rule, Chief Justice Ethridge had taken great pains to rest the decision specifically and primarily upon the court's inherent powers.

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[87] *See, e.g.*, Evans v. Central Service and Supply Co., 226 So. 2d 616 (Miss. 1969) (pleading a claim for materialman's lien may be joined with alternative contract claim); Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968) (authorizing demurrer to be filed in answer); Paulk v. Housing Authority of City of Tupelo, 195 So. 2d 488 (Miss. 1969) (trial court has considerable discretion in matters pertaining to discovery); Merchants Grocery Co. v. Merchants Trust & Banking Co., 119 Miss. 99, 80 So. 494 (1919) (requiring interrogatories under § 1712 to be served by sheriff under § 1876. *Accord,* Robinson v. Hemphill, 229 So. 2d 827 (Miss. 1969). A 1971 amendment to § 1876 appears to remove that requirement; the amendment, awkwardly worded, seems to authorize service in the manner provided by Fed. R. Civ. P. 5. *See* 2 Moore's Federal Practice ¶ 5.09 (2d ed. 1965), as to proof of due service of pleadings and papers subsequent to the complaint; Richard v. Hartford Fire Insurance Co., 256 So. 2d 502 (Miss. 1971), (permitting pleadings which included the declaration, an answer, a replication, and, apparently, a rejoinder. The court merely noted that no question was raised concerning the propriety of the pleadings).

[88] 214 So. 2d 601 (Miss. 1968).

[89] MISS. CODE ANN. § 6998-26 (1956).

[90] 214 So. 2d at 602.

[91] *Id.* at 603.

[92] 206 So. 2d 334 (Miss. 1968).

The opinion states:

> The circuit court has ample power to promulgate rules pertaining to appeals to it from the county court. *There are two sources or foundations for the rule-making power of the circuit court. First, it is a constitutional court, with the inherent power to make rules for the efficient and expeditious disposition of its judicial business.*[93]
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> * * * *
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> *The phrase "judicial power" in section 144 of the Constitution includes the power to make rules of practice and procedure,* not inconsistent with the Constitution, for the efficient disposition of judicial business. (Emphasis added.)
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> An additional source of the circuit court's power to promulgate the rule in question is Mississippi Code 1942 Annotated section 1664. . . .[94]

The significance of this opinion cannot be overstated. In the first place, as noted above, the court very carefully rested its decision primarily upon the "inherent power" flowing from the constitutional grant of judicial power. Almost as an afterthought, the rather ambiguous statutory authority was mentioned. The implications are clear. Perhaps even more significantly, Justice Etheridge went out of his way to demolish an unfortunate remark by the court in *Yazoo & M.V.R.R.* v. *Kirk.*[95] In *Kirk* the court had said, on suggestion of error, that the rules of the Supreme Court, adopted in 1910, "have no application to the practice or procedure in other courts. . . . This court has no authority to prescribe rules for the government of trial courts, and has never attempted to usurp such power."[96] There was no citation of authority and no discussion to support this statement.

In a footnote in *Reynolds* Justice Ethridge discussed the constitutional prohibition against usurpation by one branch of the state government of the functions proper to other branches and stated:

> The instant case does not involve any issue concerning the Supreme Court's power to make rules of practice for trial courts. *Nor is Yazoo & M.V.R.R.* v. *Kirk,* 102 Miss. 41, 56, 58 So. 710, 834 (1912), *relevant on that question,* where on suggestion of

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[93] *Id.* at 335 (emphasis added).

[94] *Id.* at 335-36. Section 1664 provides:

Each court . . . shall also have power to arrange the business therein in a convenient manner, and to establish from time to time, rules and orders for the conducting of suits and pleadings and respecting all matters to be done in term time or in vacation not repugnant to law.

[95] 102 Miss. 41, 56, 58 So. 710, 834 (1912).

[96] *Id.*

> error the court held only that the statute of limitations must be specially pleaded. *Kirk* merely commented that the then existing Supreme Court rules had no application to practice in lower courts, as was manifest from their language.[97]

There followed several citations, including the articles by Pound[98] and Tyler[99] and *R.E.W. Construction Co.* v. *District Court of Third Judicial District,*[100] one of the leading cases declaring the inherent power of a state supreme court to regulate the practice and procedure in *all* courts of the state.

The conclusion seems inescapable that the court utilized *Reynolds,* in itself a rather insignificant and probably unsuspecting carrier, as a vehicle to establish firmly that in Mississippi the courts are confident of their inherent rights to control practice and procedure as a natural consequence of the grant to the judiciary of the judicial power[101] and to remove *Kirk* as a potential obstacle to the supreme court's assertion of a general rule-making prerogative.

As stated at the outset, the time is now ripe for the assertion and implementation of that prerogative. From the foregoing discussion, it is apparent that the constitutional grant of the judicial power is entirely sufficient to authorize the Supreme Court of Mississippi to promulgate general rules of pleading, practice, and procedure for itself and the trial courts of this state. To undertake that step will require considerable judicial foresight and courage. Nevertheless, given the prevailing conditions, it is submitted the Court should accept its status as an equal and fully coordinate branch of the government[102] and should assert its historic function in respect to the rule-making power.

III. Scope of The Rule-Making Power

It is one thing to establish the inherent power of the judiciary to promulgate rules of pleading, practice, and procedure for the judicial system; it is quite another matter to establish the scope of that power. It has been well argued, however, that this is the heart of the matter.[103]

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[97] 206 So. 2d at 336 (emphasis added).

[98] Pound, *supra* note 16.

[99] Tyler, *supra* note 15.

[100] 88 Idaho 426, 400 P.2d 390 (1965).

[101] *Cf.* Uniform Rules of the Circuit Courts (1971) and Supreme Court Rule 42, which gives that court's blessing to one of the more crucial circuit court rules. *But see, infra* note 128.

[102] Miss. Const. art. I, §§ 1 & 2 (1890).

[103] Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 Mich. L.Rev. 623 (1957).

It has been recently suggested that the scope of the rule-making power is largely defined by the elusive boundary between procedure and substance and that the tendency of the courts has been to proceed on an *ad hoc* basis, rather than to formulate abstract definitions of the difference.[104] In Mississippi discussions of the need for reform have centered largely on the areas of pleading,[105] discovery,[106] third-party practice,[107] rules of evidence,[108] and forms of process and writs.[109]

Broadly stated rules of court cannot affect substantive law[110] and should be directed toward control of court procedure and matters of judicial administration.[111] In *State* v. *Gibson Circuit Court*[112] the court said that "laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are substantive in character, while those which merely prescribe the manner in which such rights may be enforced in a court are procedural."[113]

"Rules of practice and procedure are designed to secure the justice of the law;"[114] they involve the "judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[115] However, merely because a procedural matter involves a *substantial* matter does not render it *substantive* within the context of the boundary between the two concepts.[116]

Joiner and Miller[117] have proposed a "sensible" division between those matters which ought to be within the control of the legislative branch and those that are properly the subject of the judicial rule-making function. The division is dependent upon whether the matters involve primarily questions of important public policy, in which case they are properly of legislative concern, or whether they relate primarily to the effective and orderly administration of justice — the dispatch of the business of the courts — in which case they are properly the subject of the judicial rule-making power.[118] Questions relating to the creation of courts, their organization, the salaries of their officials, and the subjects over which they can exercise jurisdiction are all matters involving important policy considerations and should be under the control of the legislative branch.[119] Similarly, the length of the period of limitations in various cases primarily involves policy considerations, rather than the orderly dispatch of the judicial business, and is therefore subject to legislative action.[120]

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[104] *The Judiciary and the Rule-Making Power, supra* note 51, at 387-88.

[105] Fant, *supra* note 3; Patterson & Patterson, *supra* note 3.

[106] Patterson & Patterson, *supra* note 3.

[107] *Id.*

[108] *Report of the Mississippi Judiciary Commission,* 17 (1970).

[109] *Id.*

[110] Richey v. Richey, 389 S.W.2d 914 (Ky. 1965).

[111] *The Judiciary and the Rule-Making Power, supra* note 51, at 385.

[112] 157 N.E. 2d 475 (Ind. 1959).

[113] *Id.* at 478.

[114] Dogan v. Cooley, 184 Miss. 1067, 185 So. 783, 789 (1939).

[115] Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 364, 380 P.2d 1016, 1017 (1963). *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946); Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[116] Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[117] Joiner & Miller, *supra* note 103.

On the other hand, the method of commencing an action, the form, content and amendment of pleadings, the joinder of parties and causes of action, counterclaims, crossclaims, third-party practices, and intervention are all matters directly related to the orderly dispatch of litigation and are therefore within the judiciary's power to control.[121]

Further, while there are some constitutional limitations as to what constitutes effective notice, within those limits the form, content and manner of service of process should be matters of judicial, not legislative, concern, since they go solely to the orderly administration of the judicial business.[122] Thus, in *Heat Pump Equipment Co. v. Glen Alden Corp.*,[123] the court held that the method of effectuating service of process extraterritorially when a non-resident had committed an act subjecting him to suit in the forum state was a procedural matter and therefore subject to the rule-making power of the court.

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[118] Joiner & Miller, *supra* note 103, at 644.

[119] *Id.* at 644-45.

[120] *Id.* at 645.

[121] *Id.* at 646-48. *See* Fed. R. Civ. P., 8, 12, 13, 14, 15, 17, 19, 20, & 24. *Cf.* Shoemake v. Federal Credit Co., 188 Miss. 683, 192 So. 561 (1940), declaring that since intervention was unknown to the common law, it is "permissible only when authorized by a statute." *Id.* at 689, 192 So. at 562. This sort of judicial denigration of the judicial power to fashion modern techniques to deal with judicial procedures is the primary obstacle to procedural reform.

[122] Joiner & Miller, *supra* note 103, at 646-647.

[123] 93 Ariz. 361, 380 P.2d 1016 (1963).
The rationale is that the legislature should decide the policy question of what acts are sufficient within the state to subject a non-resident to suit in that state. Once that determination is made, however, it is for the court to prescribe by rule the method by which process shall be served.

The Mississippi legislature, however, has expended a vast amount of energy in making elaborate provisions for the designation of various state officials, usually the Secretary of State, as the "appointed" agent for service of process for various nonresidents and in specifying the method by which service upon such official shall be made in order to subject the desired defendant to the jurisdiction of the Mississippi courts. *See, e.g.,* Miss. Code Ann. § 379 (1956) (contractors' bonds); § 1686 (owners of perishable commodities); § 1866-02 (carnivals, circuses, fairs); § 4560-117 (processor, distributor, manufacturer or seller of perishable fresh milk products); § 5000-23 (applicators of hormone-type herbicides); § 6647 (suppliers of school textbooks); § 8496-27

By the same analysis pre-trial discovery is clearly a subject for judicial control through the rule-making power,[124] for fact finding is *the* function which almost all court procedures are designed to accomplish. Such was the specific holding in a recent New Jersey decision.[125] Other matters related to the *method* by which courts shall perform their functions obviously seem to be within the reach of the rule-making power.[126] The method by which cases are continued or dismissed,[127] the manner of instructing juries,[128] most questions of the admissibility of

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(boat operators); § 9054-30 (recipients of medical education scholarships); § 5198.7 (banks and trust companies acting as executors or administrators); § 5309-230 (corporations authorized to transact business); § 5287.5 (investors); § 5309-23 (corporations which fail to appoint registered agent); § 5309-234 (corporations which withdraw from State); § 5319 (non-profit corporations); § 5342 (domesticated corporations); § 5364 (investment companies which sell securities); § 5372 (dealers in securities); § 5595 (burial associations); § 5639 (a) (certain insurance companies); § 5672 (indemnity and guaranty companies); § 5674 (6) (insurance brokers and agents); § 5705-04 (unlicensed insurers); § 5760 (fraternal societies); § 5801 (mutual insurance companies); § 5808 (reciprocal insurers); § 9352-61 (motorists). And *see* §§ 1437 and 1438, dealing generally with non-residents who commit torts or breach contracts in this State. *But see* § 2674-16 authorizing extra-territorial personal service on importers of obscene material. Service may be made by any person over the age of 21, who is not a party to the action.

If the view expressed herein were adopted, the court might well dispense with the "seemingly empty ritual" of requiring service upon a state official as the "agent" of the non-resident defendant, and merely require that process be served directly upon the non-resident, either personally or by mail. *See* 2 Moore & Friedman, MOORE'S FEDERAL PRACTICE ¶ 4.41-1[3] (2d ed. 1965). Since due process considerations require that the method of service make it reasonably probable that the non-resident will be notified of the suit against him, the intermediate step of service on a state official is, alone, meaningless. *See* Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 532 (1927). As an example of a modern long-arm statute dispensing with the requirement of service on a state official, *see* ILL. REV. STAT. ch. 110, § 17 (1957).

[124] Joiner & Miller, *supra* note 103, at 648-49. *See* FED. R. CIV. P., 26-37.

[125] Ames v. Ames, 89 N.J. Super. 267, 214 A.2d 544, 548 (1965): "Depositions are a form of discovery, and discovery falls into the field of practice and procedure. . . ."

[126] Holm v. State, 404 P.2d 740 (Wyo. 1965).

[127] Cohn v. Borchard Affiliations, 30 App.Div.2d 74, 289 N.Y.S.2d 771 (1968), holding unconstitutional a statute which attempted to set conditions precedent to the right of the trial court to dismiss cases for lack of prosecution.

[128] Joiner & Miller, *supra* note 103, at 650. This is one of the most curious areas of Mississippi practice. MISS. CODE ANN. § 1530 (1956) requires jury instructions to be in writing and prohibits the trial judge from summing up the testimony and from

of evidence,[129] the form and content of judgments,[130] and post-judgment

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commenting on the weight of the evidence. Nor may he originate any instructions, but he must depend entirely upon the parties to request them. Watkins v. State, 60 Miss. 323 (1882). In Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932), the court somewhat reluctantly rejected an argument that this statute unconstitutionally abridged the right of trial by jury. The decision rested on the adoption of the Constitution of 1890 with the same jury trial provisions as were contained in the earlier constitutions when cases such as *Wilson* were decided. It would seem that a much stronger argument could have been mounted on the separation of powers theory. The unique Mississippi practice of having instructions read by the attorneys rather than by the judge seems to rest upon neither statute nor decision, but only on custom. McElroy, *Procedural Aspects of Motions and Instructions,* 30 MISS. L.J. 413, 420 (1959); 1 ALEXANDER, MISSISSIPPI JURY INSTRUCTIONS, § 5 (1953).

The court has recently characterized as "unsatisfactory" our procedure governing jury instructions, Duggan v. State, 256 So. 2d 511 (Miss. 1972), but has apparently not perceived its inherent power to remedy the situation. Our strange practice regarding jury instructions typifies the illogic of our entire procedural system. In 1971 the Uniform Rules of the Circuit Courts were adopted by the Conference of Circuit Judges. Rule 14 provides that specific objections to requested instructions must be dictated into the record. Subsequently, the supreme court promulgated its Rule 42, approving Circuit Court Rule 14, and providing that the supreme court will not consider any assignment of error "based on the giving of an instruction to the jury," unless the record shows compliance with Circuit Court Rule 14. All this seems to indicate a positive and progressive, albeit small, step in the right direction. However, precisely because the supreme court has not seized the initiative and laid out a well-planned procedure for handling jury instructions, the new rules raise as many problems as they solve. While the Circuit Court Rules are called "Uniform," in fact not all circuit courts follow them. If a circuit court does not require or permit compliance with Circuit Court Rule 14, how can the supreme court enforce its Rule 42? By its terms, Supreme Court Rule 42 applies only to assignments of error based on the "giving" of instructions; one wonders why that rule does not also apply to assignments of error based on the *refusal* of instructions. The Uniform Circuit Court Rules do not, of course, apply to *county courts.* Therefore, there is no rule requiring objections to instructions to be recorded in county court cases, and, presumably, Supreme Court Rule 42 would not apply to such cases. It is submitted that this strange admixture of procedural rules has no place in a modern judicial system.

[129] Joiner & Miller, *supra* note 103, at 650-51. But the legislature may properly act when policy considerations override procedural ones, as in protecting the relationship of physicians and their patients. MISS. CODE ANN. § 1697 (1956). However, the distinction, in regard to rules of evidence, is finely drawn. Wigmore has recognized that the legislative branch may play a significant role in establishing evidentiary rules, although it cannot validly "exercise a judicial power" in doing so. Since that power involves the ascertainment of facts to which appropriate principles of law are then applied, any legislative enactment "which prevents the judicial body from ascertaining the facts in litigation . . . is ineffective." 1 WIGMORE ON EVIDENCE, § 7 (3d ed. 1965). Dean Wigmore has also recognized that, "The judicial function constitutionally empowers *the Courts to make their own rules of procedure,* including rules of Evidence." *Id.* (1970 *Supp.*) It has been argued that judges are better equipped than legislators

review and appeal procedures[131] are examples of judicial function to be governed by the courts themselves.

The foregoing review is not intended to be exhaustive, but it merely shows the breadth of the rule-making power, while at the same time suggesting some of the guideposts which should differentiate that power from the legitimate legislative policy making role.

IV. JUDICIAL RULE-MAKING IN MISSISSIPPI: A PRACTICAL PROPOSAL

The foregoing discussion has demonstrated that the Mississippi Supreme Court has ample inherent power, stemming from the constitutional grant of the judicial power and the prohibition against usurpation by one governmental branch of the functions properly the domain of the other branches, to promulgate court rules. It has also suggested the extent to which that rule-making power might effectively be utilized.

But an important consideration remains; there are numerous statutes which now govern most, if not all, of the subjects which seem appropriate for judicial control. Assuming the court's willingness to exercise its historic function in the rule-making field, is not the existence of these statutes an insurmountable obstacle? Will it be necessary for the court to declare them all unconstitutional as infringements upon its constitutional prerogatives — an admittedly difficult decision in the face of a long history of acquiesence in the statutory scheme? This section of this paper posits an approach which is designed to avoid those agonizing decisions and at the same time to permit the court to recapture the role which is so obviously and rightfully its own. The desperate need for reform of judicial procedure pleads eloquently for its acceptance.

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to judge the value of evidentiary rules and, for this reason, "evidence is a proper subject for rules of court." Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 489 (1940). In *Appeal of Dattilo*, 136 Conn. 488, 72 A.2d 50 (1950), it was held that, without legislative authority, the courts have inherent power to establish rules of evidence. *Accord*, Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964); Northern States Power Company v. Esperson, 274 Minn. 451, 144 N.W.2d 372 (1966), relying on *Wigmore, supra*. Contra, State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929), holding that "Rules of evidence constitute substantive law, and cannot be governed by rules of court." 279 P. at 1103. This latter view does not obtain in Mississippi. Gulf M. & N. R.R. v. Weldy, 193 Miss. 59, 8 So. 2d 249 (1942).

[130] Joiner & Miller, *supra* note 103, at 651. But whether a judgment should constitute a lien, and if so on what property, would seem to require legislative policy decisions.

[131] *Id.* at 651-52.

It should be recalled that the legislature has no constitutional *power* to "disturb" constitutional courts in the exercise of "their functions and their orderly processes."[132] Where legislative control of judicial procedure has existed, many courts have seen it in terms of coöperation between coordinate branches of government without according any dominance to the legislative pronouncement.[133]

Seen in that light, it can readily be understood that legislative procedural pronouncements may and should be followed by the courts *so long as they provide an adequate system of judicial administration.* When such statutes fail to fulfill that requirement, however, then the court, in the exercise of its constitutional responsibilities, is obligated to depart from the statutory scheme and to devise its own procedures to effectuate the judicial function. This was the solution adopted in *Craft v. Commonwealth,*[134] wherein the Kentucky Supreme Court asserted its inherent rule-making power against a statute. A similar approach was taken in *State ex rel. Purcell* v. *Superior Court.*[135] There a statute provided a means for the release of persons charged with misdemeanors without the necessity of appearance before a magistrate. The Supreme Court of Arizona held: "Until we conclude that the legislative procedures are inadequate or other procedures will best effectuate the new right, the legislative action will be deemed the rules of this Court."[136]

The approach taken in these cases seems to rest upon firm foundation. The inherent power to make rules of practice and procedure exists "independent of and despite any statute;"[137] therefore, while deference may be given statutes so long as they do not impair the administration of justice, the inherent judicial power "carries with it a comparable supremacy of judicial rule over statute"[138] if the rule fairly falls within the scope of that inherent power.

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[132] *Ex parte* Huguley Water System, 213 So. 2d 799 (Ala. 1968).

[133] Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961); State *ex rel* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928); R. E. W. Construction Company v. District Court of Third Jud. Dist., 400 P.2d 390 (Idaho 1965).

[134] 343 S.W.2d 150 (Ky. 1961).

[135] 107 Ariz. 224, 485 P.2d 549 (1971).

[136] 485 P.2d at 552. Dean Pound once suggested that the first rule likely to be adopted by the court exercising the rule-making power would be "that the existing practice should obtain until superseded or altered." Pound, *Regulation of Judicial Procedure by Rules of Court,* 10 ILL. L. REV. 163, 176 (1915). Such a rule has long been in force in Michigan. *See* Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964).

[137] State Bar Association v. Connecticut Bank & Trust Co., 145 Conn. 222, 232, 140 A.2d 863, 869 (1958).

[138] *The Judiciary and the Rule-Making Power, supra* note 51.

It is not necessary that our present procedural statutes be repealed or declared invalid by the court. All that is necessary is that the court assert its inherent power to prescribe rules of pleading, practice, and procedure and prepare and promulgate such rules, following such statutes where they may still be useful but departing from them when "the administration of justice is impaired"[139] by the statutory procedure. It is clear that procedural rules, adopted in the exercise of the court's inherent power, have the force of law;[140] when a valid court-enunciated rule, adopted in the exercise of that constitutional power, conflicts with a contrary statute, the statute may be ignored and the rule enforced.[141]

CONCLUSION

The proposals herein advanced are admittedly novel to this state. It is submitted, however, that they rest upon a more solid foundation than does our present statutory procedural scheme, which has little to support it but years of judicial silence. The need is pressing, for there is every indication that public confidence in the judicial system is at low ebb. There is really no reason why the court should await the pleasure of the legislative branch to secure the many reforms that are required to equip the courts to handle their business in a business-like manner. This will take some courage and judicial statesmanship, but one likes to think that the proud heritage of the Mississippi bench and bar is capable of providing no less than that. As was said in *Petition of Florida State Bar Association*:[142]

> The administration of justice is the primary function of the judiciary. Practice and procedure is the vehicle by which justice is orderly administered. . . .Courts have the facilities, the technical knowledge, and experience which much better equip them for this duty than the Legislature. In such a situation, they should refrain from grounds of self abnegation and embrace the opportunity to prescribe procedure that will make the administration of justice everything that the man of the street has been taught to expect. . . .[143]

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[139] Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961).

[140] State v. Atterberry, 129 S.C. 464, 124 S.E. 648 (1924); Rosenfield v. Kay Jewelry Stores, Inc., 400 F.2d 89 (10th Cir. 1968); Mosing v. Hagen, 148 N.W.2d 93 (Wis. 1967). Further, in Alabama (equity rules), Delaware, Florida, Hawaii, Iowa, Michigan, Rhode Island, and Vermont, and possibly in South Dakota and Wisconsin, constitutional or statutory provisions explicitly provide that rules promulgated by the court supersede statutes in conflict with such rules. *See* Report No. 13, The American Judicature Society, *The Judicial Rule-Making in State Court Systems* (1970).

[141] Buscaino v. Rhodes, 385 Mich. 474, 189 N.W.2d 202 (1971).

[142] 155 Fla. 710, 21 So. 2d 605 (1945).

[143] *Id.*, 21 So. 2d at 608.

Nearly fifty years ago Dean Pound argued that a court-established procedural rule practice is simpler, more responsive to needed changes, and more flexible.[144] Experience with judicial rule-making had no drawbacks, he said, "beyond those familiar vague and general prophecies of disaster with which in all cases our best lawyers have always greeted any project with which they were unfamiliar."[145]

Dean Pound's appraisal does not stand alone. Another commentator has stated:

> It is a sad but accurate commentary that the legal profession has generally been the force most opposed to improvement of judicial procedure. Where reform has come, its advent has generally been the result of public insistence, often over active resistance from the legal profession.[146]

We should be able to stand taller than that.

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[144] Pound, *supra* note 16.

[145] *Id.* at 603.

[146] Sunderland, *The English Struggle For Procedural Reform,* 39 HARV. L. REV. 725 (1926).

STUDENT COMMENTS

CHECK FORGERIES: RIGHTS, DUTIES AND LIABILITIES OF PAYOR AND COLLECTING BANKS UNDER THE UNIFORM COMMERCIAL CODE

I. Introduction

Checks have become indispensable in the affairs of everyday life. The universal usage of checks has been prompted by their inherent convenience in discharging monetary obligations of individuals and corporations. Abusive practices, however, have accompanied the check phenomenon, creating perplexing legal problems. These practices relate to fraudulent checks which pervade the commercial sector of our society.[1] Fraudulent checks precipitate losses in the range of $600,000,000 annually.[2] Banking institutions absorb approximately $6,000,000 of this loss.[3]

Some forms of check frauds confront banks with a dilemma. With respect to forged indorsements, a bank has no assurance that the indorsement of the payee is authentic when the check is presented by a special indorsee. In most instances the bank is unfamiliar with the payee designated on the instrument.[4]

Computers are utilized today to facilitate the prompt remittance of the immense volume of checks which a bank handles. As a result banks have begun to place less emphasis on comparing the purported signature of the drawer with the customer's signature card in determining whether to charge the check to the drawer's account. Computers have led banks to rely on the magnetic encoded numbers contained on the check in debiting items to the drawer's account. Even in cases in which a signature comparison is made, it is conducted in a perfunctory manner. These lax procedures have facilitated forgeries of drawers' signatures.[6]

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[1] Fraudulent checks encompass a broad spectrum which include no-account checks, overdrafts, altered checks, unauthorized checks, checks bearing unauthorized and improper indorsements, checks payable to nominal payees, checks containing the drawer's forged signature, and checks bearing the unauthorized signature of both the drawer and payee or indorsee.

[2] Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317, 322 (N.Y. Sup. Ct. Nassau County February 9, 1970); O'Malley, *Common Check Frauds And The Uniform Commercial Code,* 23 Rutgers L. Rev. 189 (1969) [hereinafter cited as O'Malley, *Common Check Frauds*].

[3] *Id.*

[4] *See, e.g.,* Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944).

[5] *See generally* J. Clark, H. Bailey and R. Young, Bank Deposits and Collections 174 (3d ed. 1963) [hereinafter cited as Clark, Bailey and Young]; Penney, *Bank Statements, Cancelled Checks, and Article Four in the Electronic Age,* 65 Mich. L. Rev. 1341 (1967); O'Malley, *Common Check Frauds, supra* note 2, at 209 nn. 110-112.

On March 31, 1968, the Uniform Commercial Code (UCC) became effective in Mississippi.[7] Among the multifarious commercial transactions encompassed by the Code are those relating to commercial paper and bank deposits and collections. Rules which apply to various types of check frauds are found within these provisions, and banking concerns have an avid interest in these statutes since they will affect their liability.

With the increase in the volume of checks each year there will be a corresponding increase in both the number and amount of fraudulent checks.[8] It is perhaps fortunate that the Code has been promulgated to prescribe rules pertinent to this area. Underlying the formulation of the UCC is the intensive research by various bodies which have focused on the precise nature of the problem—how the loss should be allocated among the parties to the transaction.[9] It is also desirable to have laws that are intended to be uniform among the states; this is a declared purpose of the Code.[10] To date, the UCC has been adopted in forty-nine of the fifty states, the District of Columbia, and in the Virgin Islands.[11]

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[6] Johnson, *Automation, Forged Checks and The N. I. L.*, 14 BUSINESS LAWYER 1008, 1008-1009 (1959); O'Malley, *Common Check Frauds, supra* note 2, at 209; Penney, *supra* note 5, at 1341.

[7] MISS. CODE ANN. §§ 41A:1-101 *et seq.* (Supp. 1968) [the Mississippi Uniform Code will be hereinafter cited as UCC without the prefix "41A:" appearing before the applicable section number as contained in MISS. CODE ANN.].

[8] In 1962, the estimated volume of checks approached 14.5 billion which amounted to 4.7 trillion dollars. O'Malley, *Common Check Frauds, supra* note 2, at 190 n. 9. This was forecasted to have reached a volume of twenty-two billion checks by 1970. Farnsworth, *A General Survey of Article 3 and an Example of Two Aspects of Codification,* 44 TEXAS L. REV. 645, 652 n. 63 (1966). It has been stated that checks are used in ninety-five per cent of all business transactions. Vergari, *In re Articles 3, 4 and 5,* 28 TEMP. L.Q. 529, 538 (1955).

[9] Franklin Nat'l Bank v. Shapiro, 7 UCC REP. SERV. 317, 322 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[10] UNIFORM COMMERCIAL CODE § 1-102(c) [hereinafter cited as UCC].

[11] United States v. Bank of America, 288 F. Supp. 343, 345 n. 2 (N.D. Cal. 1968), *aff'd,* 438 F.2d 1213 (9th Cir. 1971). *See also* H. BAILEY, BRADY ON BANK CHECKS § 1.4, at 3-4 (4th ed. Supp. 1972) [hereinafter cited as BAILEY, BRADY ON BANK CHECKS].

The Code is not a panacea. There are many situations in which this commercial statutory maze declares no rule of law. There are other instances in which the UCC is vague, unclear, and ambiguous. Thus, the Code does not contain an exclusive enumeration applicable to all transactions. In circumstances in which the Code is silent, the general principles of law and equity are to govern.[12] This must be considered in conjunction with § 1-102 (1) which provides that the UCC is to be liberally construed to promote its underlying policies.

It is the purpose of this article to explore the rights, duties, and liabilities of collecting and payor banks, as they exist under the UCC, in relation to four varieties of fraudulent checks: (1) checks bearing forged or unauthorized indorsements; (2) checks payable to nominal payees; (3) checks containing the forged signature of the drawer; and (4) checks containing both the forged signature of the payee or indorsee and drawer. This article will entail an examination of the relevant provisions of the UCC; ascertainment of the extent which prior law has been displaced by the Code; determination of the degree to which prior law shall continue to contribute a viable role in the resolution of check forgery cases; an analysis of cases from other jurisdictions for explanation and guidance;[13] and speculations on various undecided issues presented by the UCC.[14]

II. Mississippi Pre-Code Law

A. Forged Indorsements

Since prior law may continue to play an integral role under the Code, it is appropriate to examine the law in Mississippi as it existed before the adoption of the UCC. A starting point for such an inquiry may begin with a case decided in 1911.[15] A drawer was allowed to recover from the drawee bank for payment of a check bearing the forged indorsement of the payee. The statute of limitations was deemed to have commenced when the drawer's demand to recredit his account was refused by the drawee bank.

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[12] UCC § 1-103.

[13] While cases from other jurisdictions are not authoritative, they may be used to aid in construing and applying the UCC to attain one of its salutary goals—uniformity of laws among the various jurisdictions. Evans v. Everett, 10 N.C. App. 435, 179 S.E.2d 120 (1971). A similar recognition was made by the Mississippi Supreme Court in a case arising under the provisions of the Uniform Negotiable Instruments Law. First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963).

[14] An understanding of several terms used throughout this article is necessary. Drawers are individuals who sign checks as the maker. Payees are those to whom checks are drawn payable. Collecting banks are banks which handle checks for collection and are not, also, payor banks. UCC § 4-105 (d). A collecting bank may, however, also be a depositary bank, the first bank to which an item is transferred for collection. UCC § 4-105 (a). A payor bank is the bank upon whom the check is drawn. UCC § 4-105 (b). The terms "payor bank" and "drawee bank" are used interchangeably throughout this discussion; the term "payor bank" is the UCC and the more modern version of the term "drawee bank."

One year later, in a somewhat novel fact situation, the court permitted direct recovery by a payee from the collecting bank for cashing a check containing the payee's forged indorsement.[16] A check was mailed by the drawer to the payee's Gulfport address in care of general delivery. There was another person residing in Gulfport having a name and address identical to that of the payee. When procuring his mail, the individual was given the check addressed to the payee. After indorsing the instrument, he cashed the check at the collecting bank where he was known and maintained an account. A form of absolute liability was placed on the bank for cashing the check over the forged indorsement.

> Banks taking checks must know the true parties claiming to own them—in fact, who do own them—and they act at their peril. Where there are two or more persons of the same name, it cannot be anticipated that one of them will commit a crime and forge the name of the other to an instrument which may have accidently come into his hands.[17]

In 1916 the Uniform Negotiable Instruments Law (NIL) became effective in Mississippi. One of the first forged indorsement cases construing the Act occurred in *Federal Land Bank v. Collins*.[18] A check was cashed by the collecting bank which bore the unauthorized indorsement of one of the co-payees. Subsequently the check was sent to the drawee bank who charged the check to its customer's account and remitted the proceeds to the collecting bank. The defrauded co-payee sought to hold both the collecting and drawee banks liable on the theory of an implied contract. Finding no privity of contract between the co-payee and the collecting and drawee banks, the court found the action impermissible. According to the NIL, as interpreted by the court, a bank does not become liable until it has accepted or certified the check.[19] Payment of a check, even over a forged indorsement, was not equivalent to an acceptance or certification. Since the banks had neither accepted nor certified the check there were no contractual obligations to the payee.[20] It was not until the waning moments of the existence of the NIL that Mississippi aligned itself with jurisdictions allowing a payee to sue both the drawee and collecting banks in tort for conversion.[21]

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[15] Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408 (1911).

[16] Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[17] *Id.* at 515, 58 So. at 480.

[18] 156 Miss. 893, 127 So. 570 (1930).

[19] UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 132, 189 [hereinafter cited as NIL].

Beginning with the early English case of *Young v. Grote,*[22] a rule emerged that the placement of an unauthorized signature caused by one's negligence will preclude the assertion of a bank's improper payment resulting therefrom. In *Hart v. Moore*[23] the drawee bank contended that the payee was estopped due to his negligence to recover the proceeds of a check cashed over his forged indorsement. The purported negligence consisted of directing the drawer to deliver the check to the payee's agent who was known to be untrustworthy and unreliable.[24] Recognizing that the rationale of *Young v. Grote* had been rejected in Mississippi jurisprudence,[25] the drawee bank was held liable for the improper payment.

In *Oxford Production Credit Association v. Bank of Oxford* the drawer's surety, having received an assignment of the drawer's rights against the drawee bank, after making good the drawer's loss, sought recovery on checks paid by the drawee containing forged indorsements. The court held that the drawee bank had not been negligent in paying the checks. Focusing on the plight of drawee banks in forged indorsement cases, the court stated that the drawee had no means to ascertain the authenticity of the payee's signatures since they were obscure persons residing in various counties. It would be impossible for a drawee bank, before payment of the checks, to locate the indorsers and determine the veritableness of their signatures. Basing the decision on the compensated surety doctrine, the court found that the drawee bank was crowned with the superior equity. Here the surety had been paid to indemnify the drawer and the drawee bank was not negligent.[26]

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[20] It should be observed that NIL §§ 132 and 189 refer to a drawee bank. A careful reading of the decision indicates that the court treated these provisions as applying equally to both the collecting and drawee banks. Although the decision is accurate as it pertains to the drawee bank, the court made an erroneous application by using the same theory in exonerating the collecting bank.

[21] Kaplan v. Deposit Guar. Nat'l Bank & Trust Co., 192 So. 2d 391 (Miss. 1966).

[22] 4 Bing. 253, 10 Eng. Rep. 764 (1827).

[23] 171 Miss. 838, 158 So. 490 (1935).

[24] It was alleged that the agent had been an inmate at the state penitentiary due to a conviction for embezzlement. In addition, it was charged that the agent could not be trusted because, aside from the embezzlement conviction, he had been disbarred from the practice of law for committing perjury, and was addicted to drinking intoxicants. *Id.* at 846, 158 So. at 492.

[25] Simmons v. Atkinson & Lampton Co., 69 Miss. 862, 12 So. 263 (1892).

Because collecting and drawee banks are liable for handling checks with forged indorsements, the emphasis now shifts to the party bearing the immediate loss. In an early Mississippi case, prior to the adoption of the NIL, it was held that each indorser warrants to his transferee the genuineness of prior indorsements as well as his good title to the instruments.[27] A drawee bank may recover from a prior party on the basis of this warranty.

Under the NIL there was a conflict of authority as to whether a collecting bank or other party, receiving payment from the drawee bank, extended a warranty as to the genuineness of the indorsements.[28] Although the NIL contained warranties arising from the negotiation of a check,[29] there were no provisions expressly providing for a warranty when a check was paid by a drawee bank. Technically a check presented to a drawee bank for payment is not a negotiation; the check is merely surrendered or presented for payment. It was stated that the drawee's right to recover its loss resulting from payment of a check over a forged indorsement was based on mistake in fact and, therefore, was quasi-contractual in nature. Thus, no warranties were given under the NIL by a collecting bank, or other party presenting a check for payment to the drawee, that all indorsements were genuine.[30]

Mississippi never addressed itself to the problem as to whether a drawee may recover from the collecting bank under the NIL on the basis of a warranty of genuineness of the indorsements. In one case it was held that a drawee bank may recover from one who presents for payment a check which contains the payee's forged indorsement.[31] It was said that an indorser guarantees the genuineness of all prior indorsements. No differentiation was made between "payment" and "negotiation" of a check presented to the drawee for payment; the court erroneously treated a presentment for payment as synonymous with a negotiation.

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[26] 196 Miss. 50, 16 So. 2d 384 (1944).

Generally the compensated surety doctrine precludes a surety from recovering against an innocent third party, although technically liable, when the surety has expressly assented to make good the loss, and has no superior equities against the party from whom subrogation is sought.

In the instant case the surety apparently seized on the assignment theory in order to circumvent the compensated surety defense which was recognized in National Sur. Co. v. Edwards House Co., 191 Miss. 884, 4 So. 2d 340 (1941). Some jurisdictions had recognized an assignment to be immune from the compensated surety doctrine since an assignment was an action at law. Here, the court refused to draw a distinction between an assignment and subrogation as a means to avoid the compensated surety defense. *See* O'Malley, *Subrogation Against Banks on Forged Checks,* 51 CORNELL L.Q. 441 (1966) for an excellent discussion of the compensated surety doctrine.

[27] Williams v. Tishomingo Sav. Institution, 57 Miss. 633 (1880).

[28] W. BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES § 139 (2d ed. 1961) [hereinafter cited as BRITTON, BILLS AND NOTES].

[29] NIL §§ 65, 66.

[30] *See* State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co., 56 Ohio App. 309, 10 N.E.2d 935 (1937).

The law, as it emerged in Mississippi, permitted a drawee to obtain restitution from the collecting bank on checks paid over forged indorsements. It was stated that

> [W]hile a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank with whose signature it is not familiar; and that the . . . endorser, whether for accomodation or for value, guarantees the genuineness of previous endorsements upon a check which he negotiates.[32]

In *First National Bank v. Deposit Guaranty Bank & Trust Co.*[33] the signature of both the drawer and payee were forged on several checks. Restitution was denied to the drawee from the collecting bank. It was observed that "[t]he warranty of an endorsement . . . does not apply to payment of a check by a drawee bank."[34]

> [T]he [collecting bank] owed the . . . drawee-bank no duty, imposed by custom or otherwise, to inquire into the genuineness of the check. It has the right to take the risk of advancing money upon it, if it were forged, or if for any other reason the [drawee] was justified in refusing to pay it. The [drawee's] counter is the proper place at which to ascertain whether or not the check was genuine.[35] . . . The cashing of a check by the bank upon which it is drawn effectually closes the transaction.[36]

It should be noted that the court was referring to a warranty which might arise when a check bears the drawer's forged signature.

Mutations in the law of forged indorsements arose in *Holmes County Bank & Trust Co. v. Grenada Trust & Banking Co.*[37] An attorney received checks payable to certain of his clients. After typing the names of the payees on the back of the checks and indorsing his own name thereto, the attorney deposited the checks into his account at the collecting bank. Subsequently the attorney withdrew the funds from his account. In an action between the drawee and collecting bank, the Mississippi Supreme Court held that the loss must be placed on the drawee bank. Reliance for the decision was based on *First National Bank v. Deposit Guaranty Bank & Trust Co.*, the court stating those "facts . . . [were] strikingly similar to the case at bar and the rule of law in [*First National Bank*] governs and controls here."[38]

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[31] Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

[32] *Id.* at 567, 11 So. 2d at 460.

[33] 247 Miss. 765, 156 So. 2d 814 (1963).

[34] *Id.* at 775, 156 So. 2d at 818.

[35] *Id.* at 777, 156 So. 2d at 818.

[36] *Id.* at 777, 156 So. 2d at 819.

[37] 231 So. 2d 505 (Miss. 1970).

Holmes County Bank & Trust Co. was at variance with prior law as established by the Mississippi Supreme Court and created concern among banking institutions. One commentator submitted that the decision was erroneously based on rules relating to forged-signature checks rather than forged indorsements.[39] The recent decision of *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*,[40] decided under the UCC, clarified the law. *Holmes County Bank & Trust Co.* was overruled and the traditional rule of liability restored. A statement enunciated in *First National Bank*[41] that the warranties of indorsements do not apply to payments by drawee banks was also overruled.[42] This was considered to have precipitated the wrong decision in *Holmes County Bank & Trust Co.*[43]

B. Forged-Signature Checks

Contrary to the rule relating to forged indorsements, a drawee bank is presumed to know the signature of its depositors. This principle has its rudimentary concepts from the renowned case of *Price v. Neal*.[44] Two bills of exchange, designating Price as the drawee, contained the forged signature of the maker. Neal received the bills without knowledge of the forgery. Payment was received from Price on both bills, one having been accepted before payment and the other being paid without a prior acceptance. Upon discovering that the signature of the drawer was forged, Price sued Neal to collect the money paid under mistake of fact. Lord Mansfield, denying recovery, held that the drawee must ascertain the genuineness of drawers' signatures before acceptance or payment. Looming from *Price v. Neal* is the rule that a drawee may not obtain restitution for its mistaken payment when it has access to information which would indicate that the instrument should not be paid.[45]

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[38] 247 Miss. 765, 156 So. 2d 814 (1963).

[39] BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.11, at 147.

[40] 253 So. 2d 828 (Miss. 1971).

[41] 247 Miss. 765, 775, 156 So. 2d 814, 818 (1963).

[42] 253 So. 2d at 833 (Miss. 1971).

[43] *Id.* Presiding Justice Rodgers issued a concurring opinion in which he stated that the phrase was taken out of context when applied in *Holmes County Bank & Trust Co.* It was his belief that the statement was still good law as applied to the facts of *First National Bank v. Deposit Guaranty Bank & Trust Co. Id.* at 833. Justice Brady separately concurred admitting that *Holmes County Bank & Trust Co.* was erroneously decided. *Id.* at 833-34.

[44] 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

It should be observed that the general rule relating to payment under a mistake of fact is governed by the rule of unjust enrichment. One who has received money when he was not, in fact, legally entitled to it has been unjustly enriched and normally an action in quasi-contract can be maintained to recover the mistaken payment.[46] However, *Price v. Neal* constitutes an exception to the general proposition that the payor may recover on restitutionary principles.[47]

Price v. Neal was incorporated into Mississippi jurisprudence in *Railway Express Agency v. Bank of Philadelphia.*[48] It was held to be negligence for a bank to pay a check of its depositor without first knowing the authenticity of the signature. A drawee bank will, therefore, not be permitted to recover from one obtaining payment in good faith and without knowledge of the forgery.

Although a depositor can demand that the drawee bank recredit his account for paying a check over the drawer's unauthorized signature, this general rule is subject to qualification. A rule developed that a drawer has a duty to examine his monthly bank statements and cancelled checks and report forgeries of his signature. Upon the depositor's failure to make an examination he is estopped to contest the drawee's payment of subsequent checks by the same forger.[49]

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[45] *See* UCC § 3-417, Comment 3; § 3-418, Comment 1; Farnsworth, *Insurance Against Check Forgery,* 60 COLUM. L. REV. 284, 302-03 (1960). For the reader desiring to further explore the rationale of *Price v. Neal* and its application, the following articles are recommended: Aigler, *The Doctrine of Price v. Neal,* 24 MICH. L. REV. 809 (1926); Ames, *The Doctrine of Price v. Neal,* 4 HARV. L. REV. 297 (1891); Cooper, *Forgery, Price v. Neal,* 8 ORE. L. REV. 872 (1929); O'Malley, *Common Check Frauds, supra* note 1.

[46] W. KEENER, QUASI CONTRACTS 27 (1893).

[47] *See* RESTATEMENT OF RESTITUTION § 33 (1937); F. WOODWARD, THE LAW OF QUASI CONTRACTS § 80, at 127 (1913).

[48] 168 Miss. 279, 150 So. 525 (1933).

[49] *See* Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); National Sur. Corp. v. City Bank & Trust Co., 248 Wis. 32, 20 N.W.2d 559 (1945).

Evolving in Mississippi was the rule that the drawee bank must, in the first instance, be free of negligence in paying the checks. Then the drawee may assert its customer's failure to examine his bank statement within a reasonable time. The issues of negligence of the bank in paying the item as well as a reasonable length of time for a depositor to discover forgeries were questions of fact depending on the circumstances of each case.[50]

In one case which applied this rule, the depositor's bookkeeper forged checks over a six month period before his infidelity was detected.[51] A jury found the bank negligent in paying the checks; the bank was, therefore, not allowed to claim that the depositor was derelict in examining his bank statements and cancelled checks.

A subsequent case, containing a somewhat flagrant factual situation, followed this rationale.[52] Not authorized to sign checks, a secretary diverted funds of her employer by signing checks in her own name on her employer's checking account. She also cashed checks payable to her employer after forging his indorsement. Her perfidy persisted for over five years before it was discovered. The bank was found negligent in paying the items on the unauthorized signature as well as accepting checks payable to the principal which the secretary had deposited into her personal account. This negligence obviated any inquiry into the employer's inadvertence in examining the statements and reporting the forgeries.

III. Forged Indorsements Under the UCC

A. Liability of Payor Banks

1. Actions by Payees

Under the UCC, a payor bank finally paying a check bearing the forged indorsement of the payee will incur liability as a general proposition.[53] A suitable benchmark for comparative purposes to begin an initial inquiry into the nature and scope of the payor's rights and liabilities toward the payee is presented in the recent case of *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*[54]

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[50] Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[51] Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[52] Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962).

[53] *See* State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970). *See generally* Annot., 23 A.L.R.3d 936 (1969); 18 A.L.R.3d 1393 (1968).

A warrant was drawn[55] payable to the order of the plaintiff on the drawer's account at the payor bank. The warrant was delivered to the plaintiff's agent, a commission salesman. Subsequently the agent opened a personal checking account in his own name at the collecting bank. Making no inquiry concerning the agent's authority to indorse the warrant on behalf of the payee, the collecting bank permitted the salesman to deposit the check into his personal account. Crediting the agent's account for the amount of the item, the collecting bank received final payment from the payor bank who, in turn, debited the drawer's account. Seeking to recover the amount of the check, the payee instituted an action against both the payor and collecting banks. As to the payor's liability, the court stated that "a payee may recover from the drawee bank directly on a forged or unauthorized indorsement of its name as payee."[56] It is interesting to note that the court cited no provision of the UCC for its holdings that the payor bank was directly liable to the payee. Provenance for the court's pronouncement was based exclusively on cases decided prior to the adoption of the Code.[57]

An explicit provision is contained in the UCC relating to checks paid on a forged indorsement.[58] Payment in such cases is denominated as conversion.[59] Absolute liability, subject to certain qualifications,[60] is imposed upon the drawee bank for the face amount of the instrument to the true owner.[61]

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[54] 253 So. 2d 828 (Miss. 1971).

[55] The court stated that the warrant was *issued.* 253 So. 2d at 828 (Miss. 1971). Apparently the court meant that the warrant was "drawn" rather than "issued." According to UCC § 3-102(1) (a), "issue" is defined as the first delivery of the check to a holder. Holder is defined in UCC § 1-201(20) as "a person who is in possession of . . . an instrument . . . drawn, issued, or indorsed to him or to his order or in blank." Consequently, the warrant could not have been issued since there was a delivery to one who was not a holder within the strictures of the Code. If the check was, in fact, issued the results of the decision would have been different since the agent would be a holder and his subsequent indorsement would have been valid to pass title. An issuance, technically speaking, would allow a check to be negotiated. However, a check bearing a forged indorsement can never be negotiated when it is not in the possession of a holder. *See infra* notes 66-68.

[56] 253 So. 2d at 830 (Miss. 1971).

[57] Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935); Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408 (1911).

[58] UCC § 3-419(1) (c).

[59] UCC § 3-419 provides in part:

(1) An instrument is converted when (c) it is paid on a forged indorsement.

[60] UCC §§ 3-404, 3-405, 3-406.

It should be noted that § 3-419 (1) (c) states that a check is converted when it is paid over a forged indorsement. Unauthorized signatures are defined by the UCC as including forged endorsements.[62] Due to this inclusion of forged indorsements with unauthorized indorsements conversion may also occur when a check is paid bearing an unauthorized indorsement.[63] It must be kept in mind that an unauthorized indorsement is not necessarily a forgery. The unauthorized indorsement is merely treated as a forged indorsement for the purposes of conversion under the UCC.

Checks may be drawn payable to order[64] or bearer.[65] For a check to be negotiated, there must be a negotiation within the strictures of the UCC.[66] Whether a check has been negotiated within the meaning of the Code will depend in part on the terminology of the payee clause. If the check is payable to order, there must be both a delivery coupled with the necessary indorsement.[67] Bearer checks are negotiated by delivery alone and do not necessitate any indorsement.[68]

If the payee's indorsement has been forged on checks payable to order, there is absent the necessary indorsement for a proper negotiation. Consequently no subsequent transferee of a forger can ever become a holder and, therefore, can not attain the status of a holder in due course.[69] Likewise, a check payable to order which is transferred without an indorsement is not a negotiation.[70] Therefore, the transferee cannot become a holder in due course taking the check free of all claims by any person,[71] because he is not a holder.[72] When the check is payable to bearer, the contrary results occur. Since no indorsement is mandatory, the delivery of the instrument effectively completes the negotiation. Therefore the transferee is a holder, and if the other requirements are present he may be a holder in due course.[73]

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[61] UCC § 3-419 (2). *See* UCC § 3-419, Comment 4; Gast v. Am. Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968).

[62] UCC § 1-201 (43).

[63] *See, e.g.,* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162, *aff'd,* 105 N.J. Super. 164, 251 A.2d 460 (1968); 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 3-419:4, at 1034-35 (2d ed. 1971) in which it is stated that the courts have engrafted another form of conversion into § 3-419 (1) (c) from judicial construction—payment of checks over unauthorized indorsements.

[64] UCC § 3-110.

[65] UCC § 3-111.

[66] UCC § 3-202.

[67] UCC § 3-202 (1).

[68] *Id.*

[69] For one to be a holder in due course, he must first be a holder. UCC § 3-302 (1). A negotiation is the transfer of an instrument in such a manner that the transferee becomes a holder. UCC § 3-202 (1). When a check contains an unauthorized indorsement there can be no negotiation. Therefore, the transferee cannot become a holder when a prior indorsement contains a forged indorsement.

Many checks are drawn payable to two or more payees. If a drawee pays a check which does not contain the indorsement of all the payees, the non-indorsing payee may recover against the payor bank in conversion.[74] Payor banks have been held liable to the non-indorsing payee for the face amount of the instrument notwithstanding the co-payee's interest in the proceeds was less than the amount of the check.[75]

An exception exists when the proceeds of the check actually reach the intended payee. In such cases a payor bank will not be held liable in conversion even though the check has been paid over a forged indorsement.[76]

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[70] UCC § 3-202 (1); Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 587, 324 N.Y.S.2d 543 (1971).

[71] UCC § 3-305 (1).

[72] Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341 (5th Cir. 1970).

[73] *See, e.g.,* Insurance Co. of N. America v. Atlas Supply Co., 221 Ga. App. 1, 172 S.E.2d 632 (1970).

[74] Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341 (5th Cir. 1970); State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970); Borden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 543, 324 N.Y.S.2d 543 (1971); Continental Bank & Trust Co. v. American Trust Co., 217 Pa. Super. 371, 8 UCC REP. SERV. 1092 (Pa. C.P. Montgomery County November 18, 1970). *See* BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.14, at 149 n. 36.

[75] State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970). Although this case was actually decided under pre-Code law, the court cited UCC §§ 3-419 (1) and (2) to support its conclusion that the payor bank was absolutely liable to the non-indorsing co-payee for the face amount of the check. As to the payor bank's contention that it was only liable for the amount of the payee's interest in the check, the court rebuffed by stating:

> The drawee did not pay the face amount of the check in accordance with the directions of the drawer. The unpaid payee is allowed to recover against the drawee for the face amount of the check absent any effort to prove a lesser interest in the face amount of said check. To hold otherwise would have the effect of thwarting the expressed intent of the drawer—as spelled out on the face of the check—communicated to the drawee bank, to pay to the order of the joint payees. The drawer had a right to expect the drawee to carry out his instructions to the letter, and the payees designated on the check had a right to expect that payment would be made to both of them in the absence of a direction to the contrary. 240 So. 2d at 368 (Ala. 1970).

No period is designated in the UCC concerning the time within which a payee may sue the drawee bank. Such actions will be governed by the general statute of limitation. In an early Mississippi case it was held that the three year[77] statute of limitation applies.[78] However, since payment of a check over a forged indorsement constitutes conversion, it would appear that the statute of limitation relating to conversion would be applicable.[79] Mere ignorance or lack of discovery of the wrongful payment does not toll the statute, and a conversion occurs when a check is paid bearing a forged indorsement.[80]

2. Liability to Drawers

A payor bank's liability to its customer for payment of forged indorsement checks has its genesis in the traditional contractual relationship existing between these parties. When a drawer opens a checking account, the payor bank is charged with certain duties to its customer. An implied contract exists for the payor bank to only pay checks of its depositor according to the customer's orders as communicated to the drawee on the face of the check.

In the normal course of events, the depositor, simultaneously with the opening of a checking account, will sign a signature card which authorizes the bank to pay checks according to the customer's order. The signature card is retained by the drawee who uses it to compare the signatures appearing on the drawer's checks—his orders—to ascertain their authenticity. It is a well-recognized rule that a drawee bank may only debit items[81] which are genuine to the account of its customer.[82]

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[76] Starkey Constr. Co. v. Elcon, Inc., 248 Ark. 958, 457 S.W.2d 509 (1970).

[77] Miss. Code Ann. § 729 (1956) provides in part:

> Actions . . . on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.

[78] Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570 (1930).

[79] Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601 (1970). The court held that the action was governed by the statute of limitations applicable to conversion actions. This appears to be viable since payment over a forged indorsement is denoted as conversion. Therefore, it would seem that the Mississippi Courts could apply the six year statute of limitations applicable to tort actions in Miss. Code Ann. § 722 (1956) which provides:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of action accrued, and not after.

[80] Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601 (1970).

Under the parlance of the Code a bank may charge any item against its customer's account which is "properly payable."[83] Since the commercial statutes do not define the phrase "properly payable," allusion to the law outside of the Code is necessary in order to discern its meaning.[84] It is an elementary rule of banking law that a check bearing the forged signature of the drawer, payee, or special endorsee is not "properly payable."[85] The Code fortifies this common law proposition by providing that an unauthorized signature is *wholly inoperative* as the signature of the person whose name was signed.[86] As stated by the Mississippi Supreme Court:

> [W]hen a person deposits money . . . in a bank . . . the relation of debtor and creditor is set up. . . .
> Title to the funds so deposited immediately vest in the bank, and whatever sum it pays upon a check of a creditor depositor is paid from the funds of the bank, and thereupon, if *properly paid,* the bank has the right to charge the depositor with the amount of such payment.[87] (Emphasis supplied)
> [I]t is quite well settled, and the general rule is, that a bank pays money upon a forged or unauthorized check at its own peril. . . .[88]

When a drawee pays a check bearing a forged signature of its depositor, payment by the drawee is not based upon the authentic orders of its customer.[89] Concomitantly, payment of a check over a forged indorsement is not proper since the drawer has directed the drawee to pay only to the payee designated on the check or in accordance with the payee's orders as evidenced by his indorsement.[90] A drawer is entitled to have the drawee recredit his account for the amount of the improper payment on the basis of his implied contract with the payor bank.[91]

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[81] UCC § 4-104 (1) (g). Item is defined as any instrument used for the payment of money and includes non-negotiable instruments.

[82] *See, e.g.,* State Nat'l Bank v. Sumco Eng'r, Inc., 286 Ala. 740, 240 So. 2d 369 (1970); Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970); Masonic Benefit Ass'n v. First State Bank, 99 Miss. 160, 55 So. 408 (1911).

[83] UCC § 4-401 (1).

[84] UCC § 1-103.

[85] *See, e.g.,* Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944); *see also* O'Malley, *Common Check Frauds, supra* note 1, at 195 n. 36.

[86] UCC § 3-404 (1). *See* Pacific Metals Co. v. Tracy-Collins Bank & Trust Co., 21 Utah 2d 400, 446 P.2d 303 (1968).

[87] Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 169, 146 So. 116, 117 (1933).

[88] *Id.*

[89] *See, e.g.,* Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

B. Liability of Collecting Banks

1. Actions by Payees

Commentators have submitted that the UCC does not specifically provide for a right of action in the payee against the collecting bank for cashing a check over the payee's unauthorized indorsement. Such actions, according to the general consensus, could be maintained if authorized by prior law.[92]

Conversion occurs when a check is *paid* over a forged indorsement.[93] Only a payor bank "pays" a check. A collecting bank may "cash" a check or present it to the drawee for payment, but the collecting bank does not "pay" a check. Therefore, it may be said that the Code does not technically apply to a collecting bank cashing a check bearing a forged indorsement.

Although the Code does not affirmatively vest the payee with an action against the collecting bank, it does appear that the possibility of some type of action is contemplated. Subsections (3) and (4) of § 3-419 contain express restrictions on the liability of a collecting bank. It would seem logical that an action is available against the collecting bank, otherwise the statutory language would be meaningless.

As to the nature of the action that may be brought against the collecting bank, the conversion theory could be as easily applied to a collecting bank as it is applied to a payor bank. Prior to the Code, conversion was a viable theory in several jurisdictions for a payee to predicate an action against the collecting bank.[94]

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[90] *See* Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Deer Island Fish & Oyster Co. v. First National Bank, 166 Miss. 162, 146 So. 116 (1933).

[91] Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944); Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[92] Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965); BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.14, at 499.

[93] UCC § 3-419(1)(c).

[94] BRITTON, BILLS AND NOTES, *supra* note 28, § 147, at 424.

Although conversion is the simpler and sounder approach, an action could also be maintained under the UCC on the ratification theory. There is an explicit provision in the Code permitting any unauthorized signature to be ratified.[95] The ratification theory proceeds on the assumption that a payee may elect to ratify the collecting bank's collection of the item from the payor bank; the collecting bank is deemed to be acting as the payee's agent in collecting the proceeds of the check.[96] After ratification by the payee, the collecting bank is treated as still having the funds in its hands which belong to the true owner—the payee.[97]

Most decisions to date, arising under the UCC, have permitted the payee to institute actions directly against collecting banks. Courts have utilized the conversion theory, the ratification theory, and have also resorted to prior law to ascertain the propriety of the action.[98] In Mississippi, a payee's action against a collecting bank was permissible under pre-Code law although it is not clear as to the exact nature of the action.[99]

Once it is established that a payee may sue a collecting bank, a different measure of liability is prescribed by the Code. Drawee banks are absolutely liable for the face amount of the check.[100] A depositary or collecting bank's liability is limited to the amount of proceeds remaining in its hands.[101] A collecting bank must have dealt with the instrument in good faith and in accordance with the reasonable commercial standards of its business as a prerequisite to invocation of this exculpatory provision.[102]

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[95] UCC § 3-404 (2) provides:

> Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

[96] *See* Schaap v. State Nat'l Bank, 137 Ark. 251, 208 S.W. 309 (1918); Forman v. First Nat'l Bank, 66 Misc. 2d 432, 320 N.Y.S.2d 648 (1971).

[97] BRITTON, BILLS AND NOTES, *supra* note 28, § 147, at 423.

[98] Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381 (1967); Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968); Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968); Forman v. First Nat'l Bank, 66 Misc. 2d 432, 320 N.Y.S.2d 648 (1971); Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970); Gresham State Bank v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962); Ervin v. Dauphin Deposit & Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965). *See generally* Annot., 100 A.L.R.2d 670 (1965).

[99] Kaplan v. Deposit Guar. Nat'l Bank, 192 So. 2d 391 (Miss. 1966); Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[100] UCC § 3-419 (2).

In *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*[103] the Mississippi Supreme Court held that a payee is entitled to recover from a collecting bank that has cashed a check over a forged indorsement. Section 3-419 (3), restricting the liability of collecting banks, was not mentioned. Reliance was based exclusively on the pre-Code case of *Thomas v. First National Bank.*[104] Apparently the court overlooked this salient statute. A collecting bank attempting to utilize this exonerating provision in a future case should not be foreclosed by the decision.

It should be observed that § 3-419 (3) applies to a representative having dealt with the instrument.[105] It has been held that a collecting bank, cashing a check over a forged indorsement, is not acting as a representative within the meaning of § 3-419 (3).[106] Therefore, the limitation of liability prescribed in § 3-419 (3) has no applicability in a subsequent action by the payee. The results would be the same even if the collecting bank acted solely as a representative in collecting payment. After the collecting bank obtained payment from the payor bank, the collecting bank would continue to have all of the proceeds of the checks remaining in its hands. Under this hypothesis the entire argument as to the applicability of § 3-419 (3) would be academic.

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[101] UCC § 3-419 (3). This section provides, in part:

> [A] representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of the proceeds remaining in his hands.

[102] *Id. See generally* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[103] 253 So. 2d 828 (Miss. 1971).

[104] 101 Miss. 500, 58 So. 478 (1912).

[105] *Compare* Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC Rep. Serv. 311 (Pa. C.P. Dauphin County December 6, 1965) *with* Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970) *and* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[106] Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC Rep. Serv. 311 (Pa. C.P. Dauphin County December 6, 1965).

"Representative" is defined as including "an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another." UCC § 1-201 (35).

When a collecting bank accepts a check for deposit by providing a provisional credit to the forger's account the bank is acting as a representative.[107] In these circumstances the collecting bank is acting as an agent for collection and the exonerating provision of § 3-419 (3) would be applicable.

In *Belmar Trucking Corporation v. American Trust Co.*[108] an insurance company delivered a check to an insurance broker which was payable to the order of joint corporate payees. After procuring the genuine indorsement of one of the corporate payees, the broker forged the indorsement of the other corporate payee and deposited the check into his personal account at the depository-collecting bank, who obtained final payment from the payor bank. Although not stated in the opinion, the insurance broker had apparently checked out the proceeds from his account and was financially unable to restore the money to the payee or the bank.

In an action by the defrauded payee against the collecting bank the exculpatory provision of § 3-419 (3) was found not to be an available defense to prevent the payee's recovery of the face amount of the check. Two elements must be present before the protective statute may be invoked for a collecting bank acting as a representative: (1) good faith in dealing with the instrument; and (2) conduct in accordance with the reasonable commercial standards of the collecting bank's business. Finding the bank to have acted in good faith in accepting the check for deposit, the court held that the bank had not dealt with the instrument in a commercially reasonable manner. The commercially unreasonable conduct was the collecting bank's breach of its duty to inquire into the authority of the insurance broker to indorse the check on behalf of the corporate payee. It was observed by the court that

> Generally speaking, the proceeds of a check payable to a corporate payee constitute . . . a corporate asset which may not be diverted to a noncorporate purpose. In the normal course of business such checks are deposited for collection in corporate bank accounts and the proceeds of their collection are available for the purpose of meeting corporate obligations.[109]

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[107] UCC § 4-201 (1).

[108] 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

[109] 316 N.Y.S.2d at 251 (1970).

> [We take] judicial notice of the fact that it is not normal business practice for a corporate payee of checks to endorse them in blank and deliver them to third persons in the absence of an appropriate reason and pursuant to appropriate corporate authorization. Customarily, such reason and authorization are stated in the form of a corporate resolution.[110]

Although the UCC embodies a definition of good faith,[111] there is no import ascribed to the phrase "in accordance with the reasonable commercial standards applicable to the business of such representative . . . ." Each court can fashion its own rules and is left free to rely on prior law in framing an interpretation. One commercially reasonable practice, dictated by some courts, necessitates a duty on the collecting bank to inquire into the authority of one to indorse on behalf of the payee. It has been said that the duty is not absolute but applies in circumstances which may be described as suspect.[112]

As previously noted, suspicious circumstances may arise in the case of a corporate payee.[113] It was held in one case that the duty arises when a check bears a prior restrictive indorsement and there is nothing to indicate apparent authority in the one who presented the check for deposit to indorse on behalf of the payee or special indorsee.[114] It

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[110] *Id.* at 251-52.

The court indicated that a bank may not rely solely on a corporate resolution in all cases but may be required to conduct further inquiries concerning the authority of one to indorse on behalf of the corporate payee.

> It should not be inferred . . . that it is intended as a generalization that in all circumstances the delivery of a corporate resolution concludes the need for further inquiry. There may be situations in which the form or substance of the resolution or the source of circumstances of its submission may suggest the desirability of further inquiry. Suffice it to say in the instant case there was no inquiry. Reason and authorization for the deposit of the check for collection were not established by the fact that the [insurance broker] was one of the bank's depositors. Reasonable commercial practice required, at the very least, in the process of inquiry, a request for and the receipt of an appropriate corporate resolution, duly certified. In the present fact situation it is not necessary to determine whether certification standing alone, had such a corporate resolution been submitted, would have been authentication or authorization. *Id.* at 254.

[111] UCC § 1-201 (19).

[112] Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[113] Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

[114] Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

There are other cases, decided under the UCC, indicating that a bank has a duty to inquire into the authority of one cashing or depositing a check to indorse on behalf of the payee. *See* Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th will remain to be seen how far the courts will carry the duty of a bank to conduct an inquiry so that the bank's conduct is considered commercially unreasonable. There should be no duty imposed upon a subsequent collecting bank in the collection chain; the duty should only exist on the bank first taking the check for collection or deposit from the wrongdoer.

In *Mississippi Bank & Trust Co.* the court observed that the collecting bank made no inquiry into the agent's authority to indorse on behalf of the corporate payee.[115] Perhaps the court was hinting that a collecting bank does have such a duty. Several pre-Code cases contain dicta that there is a duty to inquire.[116] Clouding the overall resolution to the question of whether § 3-419 (3) is not applicable upon a bank's failure to inquire, is the absence of any citation to the UCC regarding the collecting bank's liability to the payee.

2. Actions by Drawers

There are no provisions in the UCC conferring a drawer with a right of action against a collecting bank for payment of a check bearing the forged indorsement of the payee.[117] Massachusetts first recognized this absence of a statutory endowment in the drawer in *Stone and Webster Engineering Corp. v. First National Bank & Trust Co.*[118] Section 3-419 (1) (c) was said to apply only to payor banks, not to collecting banks. Recognizing the language of § 3-419 (3), limiting the liability of collecting banks, the court observed that the Code does not delineate to whom the collecting bank is liable. Consequently the

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Cir. 1968); Wright v. Bank of California, Nat'l Ass'n, 276 Cal. App. 485, 81 Cal. Rptr. 11 (1969) (although § 3-505 does not create a duty upon a drawee bank to conduct an inquiry, there is such a duty where a check, for a substantial sum, is presented in exchange for a cashiers check); Pacific Indem. Co. v. Security First Nat'l Bank, 248 Cal. App.2d 75, 56 Cal. Rptr. 142 (1967); Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 587, 324 N.Y.S.2d 543 (1971); Bankers Trust Co. v. Manufacturers Hanover Trust Co., 5 UCC Rep. Serv. 168 (N.Y. Spec. Term 1968); Huntingdon County v. First-Grange Nat'l Bank, 20 Pa. D. & C.2d 418 (1959).

[115] 253 So. 2d at 829 (Miss. 1970).

[116] Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[117] Clarke, Bailey and Young, *supra* note 5, 165-67. As previously noted, liability for payment of a check bearing a forged indorsement is predicated in conversion under the UCC. The Code simply states in § 3-419 that "(1) An instrument is converted when (c) it is paid on a forged indorsement."

[118] 345 Mass. 1, 184 N.E. 2d 358 (1962); *see* Annot., 99 A.L.R.2d 628 (1965).

rights of the drawer must be gleaned from pre-Code law to ascertain the propriety of such actions against the collecting bank.[119] Finding that prior Massachusetts law precluded the action, the collecting bank's demurrer to the drawer's complaint was sustained.[120]

Refusing such actions, according to the Massachusetts Court, is based on the underlying policies of the UCC. A drawer can request the payor bank to recredit his account for the improper payment.[121] There are several defenses available to a payor bank which may obviate any recovery by the drawer.[122] If the drawee bank must ultimately recredit its customer's account, the payor bank may obtain restitution from the collecting bank.[123] However, a waiver or failure to assert defenses by the payor bank against the drawer bars the payor's restitution from the collecting bank.[124] By allowing a direct action against the collecting bank, the effect of these Code defenses may be thwarted or eviscerated.[125]

It has also been argued that the drawer should not be entitled to maintain a direct action due to the different ways the drawer and payee are damaged when a check is cashed over the payee's unauthorized indorsement by a collecting bank.[126] In the case of a payee, the collecting bank precludes the true owner from enforcing the check which is presumed to be a direct injury. On the other hand, a drawer is considered to suffer no injury when the collecting bank cashes the check for the forger. Even when the payor bank remits the proceeds to the collecting bank, the drawer has not been injured inasmuch as the payor bank may never charge the item to its customer's account by rejecting the instrument and protecting the drawer. If, however, the payor bank debits the improper item to the drawer's account, injury occurs to the drawer. This injury is considered insignificant at that time, since the drawer may demand that the charge be reversed provided the request is made within three years.[127]

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[119] Discussing the permissibility of a drawer's direct action, the court, observing that § 3-419 (3) limited the collecting bank's liability, said:

> But there is not explicit provision in the Code purporting to determine *to whom* a collecting bank may be liable, and consequently, the drawer's right to enforce such liability must be found elsewhere. Therefore, we conclude that the case must be decided on our own law, which, on the issue we are discussing, has been left untouched by the Uniform Commercial Code in any specific section. (Emphasis supplied)

[120] *See* Murphey, *Uniformity, Forged Indorsements and Comprehension—Some observations on the Uniform Commercial Code for Mississippi,* 35 MISS. L.J. 356, 371-73 (1964); 4 B.C. IND. & COM. L. REV. 449 (1969).

[121] *See* UCC § 4-401 (1).

[122] *See* UCC §§ 4-406, 3-404, 3-406.

[123] *See* UCC §§ 3-417 (1), 4-207 (1).

[124] UCC § 4-406 (5).

[125] It is also stated that a check is the property of the holder and not the drawer. Consequently, the drawer cannot enforce payment to him by a collecting bank. 345 Mass. 1, 184 N.E.2d 358 (1962).

The pre-Code rule applied by the Massachusetts Court is a minority position. Most jurisdictions follow the English view enunciated in North & South Wales Bank v. McBeth, 77 L.J.K.B. (n.s.) 464 (1908), allowing drawers of negotiable instruments to maintain direct actions against collecting banks. Commercial Credit Corp. v. Citizens Nat'l Bank, 150 W. Va. 196, 144 S.E.2d 784 (1965). *See* Railroad Bldg., Loan & Sav. Ass'n v. Bankers Mortgage Co., 142 Kan. 564, 51 P.2d 61 (1935); Annot., 102 A.L.R. 145 (1936).

It has been stated by one commentator that the majority rule denies direct actions by drawers against collecting banks. BRITTON, BILLS AND NOTES, *supra* note 28, § 144.

The Massachusetts interpretation of the UCC, denying direct actions by drawers against collecting banks, appears to be an eroding concept.[128] California was the first jurisdiction razing the barrier to such suits under the Code.[129] A drawer was permitted to maintain a direct action against the collecting bank for payment of a check containing the payee's forged indorsement. The action was in contract based on the collecting bank's breach of its warranty of good title to the drawee which was extended to the drawer by implication. On principles of third party beneficiaries the drawer was said to be entitled to enforce the collecting bank's warranties extended to the payor bank.[130]

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[126] Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n., 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

[127] UCC § 4-406 (4). This section bars a drawer from asserting a forged indorsement as a grounds for recrediting his account if notice of the improper indorsement has not been conveyed to the payor bank within three years after his bank statement and cancelled checks, containing the forged check, were made available to him.

[128] Allied Concorn Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969). *See also,* Prudential Ins. Co. v. Marine Nat'l Exchange Bank, 315 F. Supp. 520 (E.D.Wis. 1970).

[129] Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr 622 (1969). This case is discussed in BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.13, at 147-8.

[130] The court said, very persuasively, that:

> The modern trend of procedure looks on circuity of action with disfavor. Privity of contract is no longer a bar to suit.
>
> Likewise the right of third party beneficiaries to directly enforce promises made and obligations assumed for their benefit has been extensively recognized, both substantively and procedurally.
>
> On third party beneficiary principles we think the benefit of warranties given by a bank which negotiates [*sic*] a check on a forged indorsement extends by implication to the drawer of the check.
>
> 80 Cal. Rptr. at 624 (1969).

Policy considerations played an integral role in permitting the action to be maintained. Prominent on the surface of the decision is the desirable objective of avoiding circuity of action.

> By allowing direct suit we reduce circuity of action and make litigation easier between parties located in different jurisdictions. Obviously, procedural difficulties are avoided by permitting direct suit by a drawer, who suffered loss, against depositary banks, the party who first honored the forged indorsement.[131]
>
> Settlement in one lawsuit of all aspects of a controversy involving commercial paper is clearly one of the prime objectives of the [Uniform] Commercial Code.[132]

With the exception of the theory enunciated by the California court, the viability of direct actions by drawers will hinge on pre-Code law.[133] There have been no cases in Mississippi involving a direct action by the drawer against the collecting bank. Several pre-Code cases contain dictum that would appear to sanction such actions.[134] If such a case is presented in the future, the Mississippi Court is free to write on a clean slate. It is hoped that there will be adherence to the impressive analysis of the California Court.

It has been held that the action must be brought in conformity with § 4-406 (4).[135] A drawer will, therefore, have to comply with the notice provision applicable to forged indorsements. This will require notice to be conveyed to the payor bank within three years. Failure to convey notice will bar the action.

C. Defenses Available to Payor and Collecting Banks

1. Authority to Indorse

All of the theories of liability for handling checks bearing forged indorsements previously discussed proceed on the assumption that the indorsement of the payee or special indorsee is not to be treated in law as his indorsement. A defense to any of these actions, available to either the payor or collecting bank, would be that the indorsement in issue was legally effective as that of the person whose indorsement it purported to be, or at least should be so treated as against the particular plaintiff in the action. The Code defines "unauthorized signature" as one made "without actual, implied or apparent authority,"[136] but it does not define these terms and thus compels adversion to the common law of agency.[137] Theories of liability not resting on Code provisions would presumably also call for application of the common law of agency to determine whether a signature is to be treated as effectively that of the person whose signature it purports to be.

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[131] 80 Cal. Rptr. at 624 (1969).

[132] *Id.*

[133] *See* Prudential Ins. Co. v. Marine Nat'l Bank, 315 F. Supp. 520 (E.D.Wis. 1970); Commercial Credit Corp. v. Citizens Nat'l Bank, 150 W. Va. 196, 144 S.E.2d 784 (1965); Clarke, Bailey and Young, *supra* note 5, 167.

[134] Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[135] Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

According to the law of agency, actual authority embodies both express and implied authority. Express authority results from manifestations by a principal to his agent.[138] Implied authority inures from authority which is implied from a general grant of express authority.[139] Apparent authority arises from conduct of the principal which would reasonably lead a third person to believe that the agent's conduct is authorized.[140] While actual authority is based exclusively on manifestations to the agent, apparent authority is grounded on some third party's belief that such authority exists. Such belief may come from words, conduct, or acquiesence of the principal.[141]

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[136] UCC § 1-201 (43). In *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.* the facts stipulated that the agent had neither real or apparent authority to indorse the warrant on behalf of his principal. 253 So.2d at 829 (Miss. 1970). In a future case the presence of real or apparent authority could be significant to the outcome of the controversy.

[137] UCC § 1-103 provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, *principal and agent,* estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. (Emphasis Supplied)

[138] SEE RESTATEMENT (SECOND) OF AGENCY § 7 and comment *c* (1958) [hereinafter cited as RESTATEMENT]; W. SEAVY, HANDBOOK ON THE LAW OF AGENCY § 8, at 12 (1964) [hereinafter cited as SEAVY, AGENCY].

[139] *See* SEAVY, AGENCY, *supra* note 138, § 8 at 13.

[140] *Id.;* RESTATEMENT, *supra* note 138, § 8. Apparent authority, as defined by the Mississippi Supreme Court, occurs where the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with an agent might believe the agent to have the power he assumes. To hold a principal liable for the agent's conduct based on apparent authority, three elements must co-exist: (1) there must be acts or conduct of the principal; (2) reliance thereon by a third person; and (3) a change in the position by such third person to his detriment. Hence, in Mississippi, there is no distinction between apparent authority and an agency by estoppel. Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955). *See also* Tarver v. J. W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939).

[141] RESTATEMENT, *supra* note 138, § 7 comment *d,* § 8 comment *e;* SEAVY, AGENCY, *supra* note 138, § 22.

Aside from actual and apparent authority, an agent may also bind his principal by an estoppel.[142] An agency by estoppel occurs from conduct of the principal which leads the third party to treat the agency as one of fact. In addition, one claiming an estoppel must have changed his position in reliance on the agency, an element not mandated in apparent authority.[143]

As relating to forged indorsements, there has been a disparity among the various jurisdictions as to the circumstances in which a principal will be estopped on the basis of an agent's apparent authority. Some jurisdictions are liberal[144] in allowing a principal to be lax in controlling and supervising his agents while other jurisdictions have been more restrictive.[145]

The liberal view is represented in a case in which an agent diverted checks over a period of three years payable to the principal's order, supplied the indorsements, and deposited the checks into his personal checking account. It was held that the agent had no apparent authority to permit the indorsements to be deemed authorized by the principal.[146] Mere laxity in supervising an agent has been held by another court as not to be sufficient to protect a bank, cashing checks bearing the principal's unauthorized indorsement by the agent, on the basis of an agent's apparent authority.[147]

An example of the more restrictive approach may be gleaned from *Senate Motors, Inc. v. Industrial Bank*.[148] Engaging in the sale of automobiles, the plaintiff had employed an agent who was allowed to retail a car to a purchaser on his own initiative. In these transactions, the agent would sell the car and, before payment of the purchase price by the purchaser, deliver the vehicle. Bank drafts were delivered to the agent, by the defendant bank, representing loans to the respective purchasers for the balance of the purchase price of the automobile.

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[142] SEAVY, AGENCY, *supra* note 138, § 8, at 14.

[143] RESTATEMENT, *supra* note 138, § 8, comment *b*.

[144] *See, e.g.,* Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th Cir. 1968); R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960).

[145] Commercial Cas. Ins. Co. v. Isbell Nat'l Bank, 223 Ala. 48, 134 So. 810 (1931); Arcade Realty Co. v. Bank of Commerce, 180 Cal. 318, 181 P. 66 (1919); Senate Motors, Inc. v. Industrial Bank, 9 UCC REP. SERV. 387 (D.C. Super. Ct. July 2, 1971); *see* O'Malley, *Common Check Frauds, supra* note 2, 237 and n. 299.

[146] Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th Cir. 1968). *See* Industrial Plumbing & Heating Supply Co. v. Carter County Bank, 25 Tenn. App. 168, 154 S.W.2d 432 (1941).

[147] R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960).

[148] 9 UCC REP. SERV. 387 (D.C. Super. Ct. July 2, 1971).

The drafts were drawn payable to the plaintiff. These checks were indorsed by the agent and deposited into his personal checking account at the defendant bank, the agent's personal check being given to the principal for payment of the outstanding balance of the respective purchaser. Over a period of thirty-four months, on at least ninety-five occasions, the agent pursued this practice. The agent failed to account to his principal for three transactions after the bank had delivered checks to the agent which were payable to the principal and deposited into the agent's personal checking account. An action was instituted by the principal against the depository-collecting bank.

The court found that the principal was estopped from denying its indorsement by the agent. The persuasive factors were that this was an established practice permitted by the payee, that the payee had knowledge of the loans, and due to the extended time this practice was allowed to persist, a resulting duty was cast upon the principal to notify the bank of the lack of the agent's authority to indorse. In the absence of such notification the bank could reasonably assume that the agent had authority for his conduct. As to negligence the court said:

> [N]egligence is not, in this area, a broad doctrine but, as applied to a payee in respect of a non-restrictive endorsement, is limited to careless conduct by the payee which proximately and substantially contributes and relates to the creation of apparent authority in the endorser.[149]

2. Ratification and Estoppel : § 3-404

While an unauthorized signature is *wholly inoperative* it may be *ratified* or the person whose name has been signed on the instrument may be *precluded* from asserting the surreptitious signing.[150] There is a conflict of authority in the common law of agency as to whether a forged signature may be ratified.[151] This controversy is resolved in the Code by permitting such signatures to be ratified, but only for "all purposes of this Article."[152]

Ratification and a preclusion are defenses which obviously apply in cases arising under express provisions of the Code. However, some actions against payor and collecting banks may be based on non-Code principles. In these cases a court could adopt the defenses in § 3-404.

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[149] *Id.* at 391.

[150] UCC § 3-404 (2).

[151] BRITTON, BILLS AND NOTES, *supra* note 28, § 128.

[152] UCC § 3-404 (2).

Assuming a court does not apply the Code defenses, in a case based on a non-Code theory, ratification was recognized in the common law of agency, at least where the unauthorized indorser purported to be an agent.[153] There was also a preclusion, in the sense of an estoppel, to deny the genuineness of a signature which was embedded in the common law.[154]

Generally ratification vindicates unauthorized conduct by an agent[155] and the transaction has the same effect as if the conduct were previously authorized.[156] Traditionally, a valid ratification requires that the principal have knowledge of the essential facts. An acceptance of a transaction with the principal's knowledge of the facts constitutes a ratification. There is no need for a formal acceptance as such. Acceptance of the benefits of or acquiescence in a transaction is sufficient.[157]

Insight into the interpretation and application of a ratification in the UCC may be obtained from the comments to § 3-404.[158] It is stated that an unauthorized signature may be adopted. Ratification is used to make explicit that the adoption is to be retroactive to the date of the transaction. Conduct as well as express representations may give rise to a ratification. Although a forger does not have to be a technical agent of the individual whose signature is forged, a purported ratification is, nevertheless, to be governed by principles of agency.

An example of a ratification contained in the comments is the retention of benefits of a transaction with knowledge of the forgery. In *Starkey Construction Co. v. Elcon, Inc.*[159] checks were paid over the forged indorsements of several joint payees. Ratification was found to bar recovery by the drawer against the payor bank. Payment was separately tendered to some of the defrauded payees by the forger and credit was extended to the forger by the remaining defrauded payees.

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[153] BRITTON, BILLS AND NOTES, *supra* note 28, § 128.

[154] *Id.*

[155] *See, e.g.,* Baker & Vardeman v. Byrne, Herman & Co., 10 Miss. (2 S. & M.) 193 (1844).

[156] RESTATEMENT, *supra* note 138, § 83; SEAVY, AGENCY, *supra* note 138, §§ 32-41. *See also* Gulf Refining Co. v. Travis, 201 Miss. 336, 30 So. 2d 398 (1947); *see generally* annot., 100 A.L.R.2d 670, 678 (1965); 150 A.L.R. 978 (1948); 144 A.L.R. 1440 (1943).

[157] R. T. Polk Cotton Co. v. Bethel, 136 Miss. 154, 96 So. 305 (1923); Thurmond v. Carter, 59 Miss. 127 (1881); Vicksburg & M. R.R. v. Ragsdale, 54 Miss. 200 (1876); Meyer v. Morgan, 51 Miss. 21 (1875); *see* RESTATEMENT, *supra* note 138, §§ 93-99; SEAVY, AGENCY, *supra* note 138, §§ 36-38.

[158] UCC § 3-404, Comment 3.

[159] 248 Ark. 958, 457 S.W.2d 509 (1970).

Therefore, the defrauded payees had ratified their unauthorized indorsements.[160]

According to the comments, an estoppel, denoted as a preclusion in the parlance of the Code, is to include both negligence and express representations that a surreptitious signature is genuine.[161]

3. Negligence: § 3-406

Another example of a situation in which one will be precluded from proving a signature is not genuine is found in § 3-406. This section provides that one will be precluded from asserting his unauthorized signature if his negligence substantially contributed to the placement of the signature on the check. This is a codification of *Young v. Grote*[162] which was not recognized in Mississippi prior to the adoption of the UCC.[163] It should be kept in mind that a court could adopt the Code's defense of negligence in a forged indorsement case based on principles contained outside of the UCC.

No definition is provided in the Code as to when negligence substantially contributes to the making of an unauthorized signature. According to the comments, the question is to be resolved by the jury based on the facts and circumstances of each case.[164]

Several cases illustrate the application of § 3-406. In *Gresham State Bank v. O. & K. Construction Co.*[165] a bookkeeper, employed by the plaintiff company, had access to a rubber stamp which printed the name and address of the plaintiff. Upon receiving certain checks, payable to the company, the bookkeeper stamped the checks impressing the company name thereon and signed his name below. These checks were cashed at a nearby store. No inquiry was conducted by the defendant store owner concerning the bookkeeper's authority to indorse and cash the checks. The court noted that § 3-406 would not preclude the assertion of the unauthorized indorsements unless two conditions were present: (1) the plaintiff's negligence substantially contributed to the making of the unauthorized indorsements; and (2) the store paid the check in good faith according to the reasonable commercial standards of its business.

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[160] *See* Davis Aircraft Prod. Co. v. Bankers Trust Co., 36 App. Div. 2d 705, 319 N.Y.S.2d 379 (1971) (drawer's signature forged on one account and proceeds deposited in another bank where the drawer maintained a second account—held drawer had ratified the unauthorized signature by retaining the proceeds). *See also* Wiest v. National Bank, 10 Lycoming R. 125 (Pa. 1966); Rehring v. Fortunak, 39 Pa. D. & C.2d 20 (Pa. 1966).

[161] UCC § 3-404, Comment 4.

[162] 4 Bing. 253, 130 Eng. Rep. 764 (1827).

[163] Simmons v. Atkinson & Lamaton Co., 69 Miss. 862, 12 So. 263 (1892).

[164] UCC § 3-406, Comment 3.

[165] 231 Ore. 106, 370 P.2d 726 (1962).

For failing to discover the surreptitious indorsements the company was found negligent within the purview of § 3-406. The bookkeeper's chicanery had continued undetected for over three years and the company could have unveiled the fraudulent scheme by comparing the deposits on its bank statements against the payments by its various customers. However, the defendant store was found, as a matter of law, not to have paid the checks in accordance with the reasonable commercial standards of its business in failing to inquire into the authority of the bookkeeper to indorse the checks. As between a negligent payor and a negligent principal, the payor was required to bear the loss precipitated by the bookkeeper's unauthorized indorsements of his principal. It was held that § 3-406 requires "a weighing process in choosing between the owner of the forged instrument and the payor in allocating the loss."[166]

In *Gresham State Bank v. O. & K. Construction Co.*, there was a misapplication of § 3-406. Section 3-406 is expressly available in favor of only two classes: (1) holders in due course, and (2) "a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." Since the checks contained unauthorized indorsements, the store could not have been a holder in due course.[167] In cashing the checks the store was not a "payor," rather the store was merely a transferee. Consequently, it could not claim protection under § 3-406. In forged indorsement cases § 3-406 will only be available to a "drawee or payor,"[168] assuming that payment is in good faith and according to reasonable commercial standards.[169]

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[166] 370 P.2d at 732.

[167] See *supra* notes 69-71.

[168] There is no definition of "payor" contained in the UCC. "Payor bank" is defined as "a bank by which an item is payable as drawn or accepted." UCC § 4-105 (b). In the comments it is stated that § 3-406 is to apply to payors who may not technically be drawees. UCC § 3-406, Comment 2. The term "payor" seems to imply one who is discharging a legal obligation he has on the check or one who is fulfilling some duty he has with respect to the check. This would practically exclude all parties enumerated in § 3-406 except a drawee bank and would never apply to a transferee of an instrument.

[169] Several courts have held reasonable commercial standards dictate an inquiry by the bank into the authority of the one presenting the check for deposit or cashing to indorse on behalf of the payee. *See, e.g.,* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968); Gresham v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962).

The courts have failed to recognize the limitation of § 3-406. Several cogent arguments could be framed to overcome the obstacle of the applicability of § 3-406 to transferees in forged indorsement cases. It could be urged that "holder in due course," as used in § 3-406, does not refer to a holder in due course in the strict sense but refers to one in the broader sense that takes the instrument in good faith and without knowledge of the unauthorized indorsement.[170] It could also be argued that although there is an estoppel in the circumstances denoted in § 3-406 this does not necessarily prevent an estoppel from arising in other situations, the Code being regarded as silent on the issue.[171]

Negligence has played a more viable role in actions by drawers against payor banks. This may be seen from *Thompson Maple Products v. Citizens National Bank,*[172] a well-known decision under the UCC. Logs were purchased by the plaintiff from various timber owners. Local truckers transported the logs for the timber owners to the plaintiff's mill. At the mill, duplicate scaling slips were prepared by an employee of the plaintiff which denoted the quality and grade of the logs. In addition, the name of the timber owner was designated on the slip, the name being supplied by the respective trucker. A copy of the scaling slip was to be given to the trucker and the original transmitted to the plaintiff's bookkeeper, who prepared a check payable to the timber owner named on the slip. Blank sets of scaling slips were often left available on the plaintiff's premises which were easily accessible to the truckers. One trucker procured several pads of scaling slips pretending to need them for scratch pads. These slips were completed and reflected fictitious deliveries of logs coupled with the names of local timber owners as suppliers. Over a substantial period of time the forger delivered the slips to the bookkeeper who drew checks payable to the purported owners. Volunteering to deliver the checks to the payees, the forger persuaded the bookkeeper to entrust the checks to him for delivery. After forging the name of the payees, the forger obtained payment from the drawee bank. After the fraudulent scheme was unraveled, the plaintiff drawer sought to collect the amount of the checks from the drawee which were paid within three years after the plaintiff conveyed notice to the payor bank of the forgeries.

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[170] Certain definitions are contained within the Code which contain the phrase "unless the context otherwise requires." UCC §§ 1-201, and 3-102. In § 3-302, a holder in due course is defined but the definition is not qualified by the phrase "unless the context otherwise requires." Therefore, this approach may not be sound since § 3-302 purports to be an unqualified definition of holder in due course.

[171] UCC § 1-103 states, in part, that the "law relative to . . . estoppel" is to supplement the provisions of the Code.

[172] 211 Pa. Super. 42, 234 A.2d 32 (1967).

In finding the drawer negligent in substantially contributing to the forged indorsements the drawee was exonerated for its improper payments. There was a failure of the plaintiff to maintain proper procedures in remitting payments to the timber owners as well as the plaintiff's failure to discover the fraudulent scheme. Construing § 3-406, the court said that the preclusion is not equivalent to an estoppel and, therefore, does not require negligence that is direct and proximate necessitated under pre-Code law. The UCC was stated to have "shortened the chain of causation which the . . . bank must establish."[173]

The rationale of *Thompson Maple Products* has been followed by other courts. In a case involving the subrogee of a drawer against the payor bank the New York court said that the UCC modifies the chain of causation to negligence which contributes substantially to the unauthorized signature.[174]

> [S]ection [3-406] gives statutory sanction to the duty of a drawer to protect the drawee against forgeries, imposes additional duties on a bank's customer and will increase the duty of care owed to the drawee by the one who sets the instrument in motion.[175]

Another court has interpreted § 3-406 in a similar manner to mean that it is the "contribution to forgery rather than the negligence [which] must be substantial" to invoke the preclusion.[176]

Manifestations of negligence which substantially contribute to an unauthorized indorsement arose when a drawer mistakenly mailed a check to the wrong person.[177] In *Gordon v. State Street Bank & Trust Co.*[178] negligence was found in the manner in which the negotiations culminating into the preparation of the check were conducted. A man named Wolf had negotiated with the drawer for a loan. A promissory note, prepared by the drawer, was submitted to Wolf and his wife. Wolf signed the note and forged his wife's signature thereto. A check was drawn jointly payable to Wolf and his wife after Wolf had returned the promissory note to the drawer. Wolf indorsed the check forging his wife's indorsement and received payment. After Wolf's death, the drawer contacted the wife concerning the unpaid balance of the note. She denied having any knowledge of the transaction, as well as signing the note and indorsing the check.

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[173] 234 A.2d at 34 (1967).

[174] Fidelity & Deposit Co. v. Chemical Bank New York Trust Co., 65 Misc. 2d 619, 318 N.Y.S.2d 957 (1970).

[175] 318 N.Y.S.2d at 959 (1970).

[176] Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968). *See also* Gresham State Bank v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962).

[177] Park State Bank v. Arena Auto Auctions, Inc., 59 Ill. App. 2d 235, 207 N.E.2d 158 (1965). A check was mistakenly mailed by the drawer to one in Illinois who had a name similar to the drawer's creditor in Alabama, the intended payee. The Illinois recipient, knowing he had sold no merchandise to the drawer, indorsed the check and received the proceeds therefrom. A stop order was issued to the payor bank, and the check was not finally paid by the drawee. Subsequently, another check was prepared, payable to the Alabama creditor, and was again mistakenly mailed to the Illinois resident, who cashed the check. Section 3-406 was held to bar the drawer from asserting the forged indorsement against the payor bank; the drawer's conduct was deemed to have substantially assisted in making it possible that an unauthorized indorsement passed title to the funds represented by the check.

[178] 9 UCC Rep. Serv. 697 (Mass. App. Div. May 6, 1971).

In the drawer's action against the drawee bank, the court concluded that the loss should be placed on the drawer. Observing that the drawee bank had no knowledge regarding either payee designated on the instrument, the drawer, as maker of the check, was deemed to have contributed to the perpetration of Wolf's fraudulent scheme. Therefore, the court felt compelled to place the loss on the party whose conduct made the loss possible.

D. *Restitution for Payor and Collecting Banks.*

Once it is determined, in an action by a drawer or payee, that a payor bank is liable for payment over a forged indorsement, the inquiry necessarily focuses on whether the drawee bank may seek restitution. An affirmative answer is provided in the Code. The payor bank may recover from the customer or collecting bank who obtained payment.[179] In such instances the customer or collecting bank, whichever the case may be, is deemed to have breached its warranty that it had "good title to the [check] or [was] authorized to obtain payment on behalf of one who [had] good title. . . ."[180] Thus, the payor bank is entitled to recover on the basis of the statutory warranty of title and genuineness which accompany payments of checks.[181]

In *Mississippi Bank & Trust Co.* the Mississippi Supreme Court, relying on the warranties of the UCC, held that as between the drawee and collecting banks, the collecting bank must bear the loss. There was a breach of the collecting bank's warranty that it had good title to the instrument.[182] Commenting on the scope of the warranty, after citing §§ 4-207 (1) (a), (2) (a) and (b), the court said:

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[179] UCC §§ 3-417 (1) (a), 4-207 (1) (a); *see* Continental Bank & Trust Co. v. American Bank & Trust Co., 217 Pa. Super. 371, 8 UCC Rep. Serv. 1092 (Pa. C.P. Montgomery County November 18, 1970); Security Bank & Trust Co. v. National Bank of Commerce, 8 UCC Rep. Serv. 1086 (Okl. Ct. App. March 9, 1971).

[180] UCC §§ 3-417 (1) (a), 4-207 (1) (a); *see also* UCC § 3-417, Comment 3.

[181] UCC §§ 3-417 (1) (a), 4-207 (1) (a); Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317 (N.Y. Sup. Ct. Nassau County February 9, 1970).

> The clear effect of this statute is that [the collecting bank] by transferring [sic] the warrant by its endorsement, after receiving consideration, warranted to [the payor bank], who took the item in good faith, that all signatures were genuine or authorized.[183]

This was a misapplication of the applicable warranty provisions to the facts of the case. Section 4-207 consists of two sets of warranties which apply in different situations and contain different wording. The warranties in § 4-207 (1) are given by a party obtaining payment from the payor bank.[184] On the other hand, the warranties in § 4-207 (2) are given by a transferor to his transferee and arise only upon the transfer of an instrument. These warranties do not run in favor of a payor.[185] A collecting bank or other party obtaining payment from the payor of a check which bears a forged indorsement has given and breached a § 4-207 (1) warranty, not a warranty arising under § 4-207 (2).[186]

Policy considerations have played an integral role in placing the temporary loss on collecting banks. With respect to forged indorsements, a collecting bank is considered to be responsible for the loss. A teller cashing or accepting a check for deposit can with a modicum of care normally ascertain the propriety of the indorsements, or at least ascertain if the check is indorsed.

> [I]n contemporary banking practice . . . checks are processed (once accepted by the teller) by automated, electronically operated equipment without further human intervention. Considering the immense volume of checks drawn against . . .

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[182] 253 So. 2d 828 (Miss. 1971).

[183] *Id.* at 830.

[184] Clarke, Bailey and Young, *supra* note 5, 132-133. In providing for a warranty payment of a check the UCC departs from prior law since a payor's recovery was predicated in quasi-contract based on mistake of fact. *See supra* notes 28-30.

[185] Clarke, Bailey and Young, *supra* note 5, at 142.

[186] Other courts have also confused the warranties of §§ 4-207 (1) and (2) treating the two as synonymous. *See, e.g.,* First Pennsylvania Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596, 1 UCC Rep. Serv. 291 (Pa. C.P. Montgomery County September 17, 1962).

The erroneous application of the warranties in § 4-207 (1) and (2) may be demonstrated in a case involving a forgery of the drawer's signature. A party obtaining payment from the payor only warrants that he has no knowledge that the drawer's signature is unauthorized. UCC §§ 3-417 (1) (b), 4-207 (1) (b). If there is a "transfer" of the instrument there is an unqualified warranty extended to the transferee that all signatures are genuine or authorized. UCC §§ 3-417 (2) (b), 4-207 (2) (b).

> [drawee banks] each working day, it would be casting an impossible burden . . . to examine each instrument individually. Lex no cogit ad impossibilia.[187]

One purpose of the Code is to speed up the collection process of the titanic volume of checks. To require each bank handling the item to meticulously examine each indorsement would result in duplicity of manpower and bog down the collection process. Logic, so it is said, mandates that the first bank taking the item for collection should be held primarily responsible for examining the indorsements and ascertaining if they are proper and authentic.[188]

It should be noted that the Code requires a payor bank, or other party, to make a claim for a breach of warranty within a reasonable time after knowledge of the breach is acquired.[189] Failure to convey a seasonable notice of the claim will discharge the liability of the party obtaining payment by the amount of the loss incurred due to the delay.[190]

It has been determined that the first bank obtaining payment from the payor bank of a check bearing a forged indorsement will, under the UCC, be temporarily liable. This bank can in turn pass its loss back until it comes to rest with the first bank accepting or cashing the check by proceeding for a breach of warranty under § 4-207 (2). Theoretically, each transferee will recover from his transferor through the chain of indorsers until the loss is ultimately placed on the forger. In most instances, the person perpetrating the forgery will not have sufficient funds to reimburse his transferee or has absconded and cannot be found. Allocation of the loss from forged indorsements, for all practical purposes, will be placed on the first party taking the check from the forger.

IV. Nominal Payees

There are instances in which checks bearing the forged indorsement of the payee may be effective and not create liability upon a collecting bank cashing or accepting a check for deposit or a drawee bank's final payment of the check. Specifically, this has reference to nominal payee situations in which the payee's name is but a mere conduit for the forger to obtain the check.[191] There are three classifications presented in the Code depicting nominal payee situations: (1) imposters; (2) fictitious payees; and (3) padded payroll cases. It should be noted that in order for any of the provisions of § 3-405 (1) to come into operation, there must first be an indorsement in the payee's name. A bank accepting a check under circumstances that would otherwise fall within the ambit of § 3-405 (1) looses the protection of the statute when there is no indorsement contained on the instrument.[192] Checks payable to fictitious payees and imposters are order paper and require an indorsement.[193]

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[187] Continental Bank & Trust Co. v. American Bank & Trust Co., 217 Pa. Super. 371, 8 UCC Rep. Serv. 1092 (Pa. C.P. Montgomery County November 18, 1970).

[188] Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 303 F. Supp. 401, 403 (M.D. Fla. 1969).

[189] UCC § 4-207 (4).

[190] *Id.; See* Clarke, Bailey and Young, *supra* note 5, 144.

[191] 2 R. Anderson, Uniform Commercial Code § 3-405:4, at 932 (2d ed. 1971).

A. *Imposters: § 3-405 (1) (a)*

A check containing the forged indorsement of the payee which was procured by an imposter, through the mail or otherwise, is effective if such impersonator induced the drawer to issue the check to him or his confederate in the payee's name.[194] A well-known case, arising under the UCC, which provides an apt illustration of the operation of the imposter doctrine is *Philadelphia Title Insurance Co. v. Fidelity Philadelphia Trust Co.*[195] It was held that § 3-405 (1) (a) includes cases where the imposter induces the drawer to draw a check, even though there are no direct dealings between the imposter and the drawer. An imposter can use a third party upon whom the drawer relies in issuing the check. The court sounded the death knell to the general pre-Code rule that an imposter must have direct dealings with the drawer as a prerequisite to the invocation of the imposter rule. Authority for the courts decision was based on the phrase that the impersonation may be by the "mails or otherwise."

> [T]he Legislature could not have predicted and expressly included all ingenious schemes designed and carried out by imposters for the purpose of defrauding the . . . drawers of negotiable instruments. Something had to be left to the courts by way of statutory construction. For purposes of imposing the loss on one of two "innocent" parties, either the drawer who was defrauded or the drawee bank which paid out on a forged indorsement, we see no reason for distinguishing between the drawer who is duped . . . directly . . . and a drawer who is duped by an impersonator communicating indirectly with him through third persons.[196]

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[192] Wright v. Bank of California, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969).

[193] In this respect the UCC limits the fictitious payee rule as it existed under the NIL, notwithstanding the fact that the UCC was intended to expand the coverage of the fictitious payee rule. Under the NIL, checks payable to fictitious payees were bearer paper which could be negotiated without any indorsement. Such instruments under the Code are payable to order which mandates an indorsement in the payee's name, no matter by whom, for the check to be negotiated. UCC §§ 3-116, 3-117, 3-202; Wright v. Bank of California, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969).

[194] UCC § 3-405 (1) (a).

[195] 419 Pa. 78, 212 A.2d 222 (1965).

[196] 212 A.2d at 225 (Pa. 1965).

Application of the imposter rule was invoked in *Fidelity & Deposit Co. v. Manufacturers Hanover Trust Co.*[197] to validate a forged indorsement. A savings and loan association issued a check, payable to one of its customers, relying upon a withdrawal order purportedly signed by the customer. However, the customer did not sign or present the withdrawal order. Although it was not clear whether the impersonator was the former husband of the customer or the husband's second wife, the imposter rule was considered applicable in either event.

If the husband's second wife had appeared at the drawer's office, there was an impersonation since she was pretending to be the customer.

Examining the signature on the withdrawal order, the drawer concluded that the signature corresponded with its customer's signature on the account card. If the former husband had presented the withdrawal order, he could have been acting as the agent for his former wife. When one falsely represents that he is the agent of another the imposter rule does not apply. In such cases the drawer intends for the check to be issued and to be the property of the principal and not the agent.[198] The fraud of the agent relates to status and not to identity.[199] Here, however, the court observed that the drawer did not rely upon any representation of agency because a signature comparison was conducted. Contented that the signature on the withdrawal order was its customer's, the drawer gave the check to the former husband. Any false representation of agency was found to be irrelevant since the court felt that the circumstances came within the phrase "or otherwise" in § 3-405 (1) (a). Thus, the drawer intended to deal with the person whose signature was contained on the withdrawal order. Since the husband forged his former wife's signature, he was the one to whom the drawer issued the check. As analyzed by the court, in algebraic forms, the drawer issued a check "to X in A's name; A was really X posing as A; [the drawer] therefore intended to issue the checks to X, albeit in A's name."[200]

It is submitted that the court's reasoning is questionable. If "X" appears with a withdrawal order purportedly signed by "A" and the drawer delivers a check to "X", payable to "A's" order, it cannot be realistically assumed that the drawer intended "X" to be the payee.

In *Franklin National Bank v. Shapiro*[201] the plaintiff bank, both the drawer and drawee, mailed a check jointly payable to a husband and his wife after receiving a promissory note, by mail, containing the purported signature of both parties.

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[197] 63 Misc. 2d 960, 313 N.Y.S.2d 823 (1970).

[198] *Id.; see* UCC § 3-405, Comment 2.

[199] *See, e.g.,* Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317, 321 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[200] 313 N.Y.S.2d at 827 (1970).

[201] 7 UCC Rep. Serv. 317 (N.Y. Sup. Ct. Nassau County February 9, 1970).

A total of three checks were issued which represented loans evidenced by promissory notes, and all negotiations were conducted by mail. Upon default of the installment payments, the bank conducted inquiries. The husband informed the bank that his wife had died and, furthermore, that he had no knowledge of the loans. After perusing the promissory notes and checks, he stated that his signature and indorsements thereto were forgeries. An action was instituted against the depository and intermediary banks for breach of their warranty of genuineness of all prior indorsements by the drawer-drawee.[202]

Commenting on the scope of § 3-405 (1) (a), the court said:

> [T]he drawer is made to bear the loss irrespective of the method of fraud or media of communication to consumate the deception. The endorsement of the impersonated person's name is effective no matter by whom it is made.[203]

Armed with the basic purpose of the UCC — loss apportionment — the court held that the drawer-drawee was held to bear the loss. By employing a policy of proper diligence and vigilance in granting the loans the bank could have prevented the wife's chicanery.

This decision seems to go against the grain of § 3-405 (1) (a). It is not pragmatic to assume that the wife was pretending to be both herself and her husband. And it is certain that the drawer did not think she was pretending to be both persons.

B. *Fictitious Payees: § 3-405(1)(b)*

When one signs a check as or on behalf of the drawer intending the payee to have no interest therein, the subsequent forgery of the payee's indorsement does not render the indorsement ineffective.[204] Perhaps "fictitious payees" is a misnomer because the test is not whether the payee is fictitious but rather the intent of the drawer that the payee is to have no interest in the check.[205]

A corporate officer drawing checks intending the payees to have no interest in the proceeds thereof will precipitate invocation of the fictitious payee rule. A forgery of the payee's indorsement will be effective for a negotiation or to authorize the drawee bank to pay the instrument.[206]

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[202] UCC §§ 3-417 (1), 4-207 (1).

[203] 7 UCC Rep. Serv. at 321 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[204] UCC § 3-405 (1) (b).

[205] UCC § 3-405, Comment 3.

The question has arisen regarding the application of the fictitious payee rule to checks requiring the signatures of co-makers. A check drawn pursuant to the fraudulent representations of one co-maker, intending the payee to have no interest in the check, to the other co-maker comes with the purview of the fictitious payee rule. This applies even though one co-maker has no knowledge of the fraudulent scheme.[207] Therefore, where the intent of the co-makers are divergent, the loss will be borne by the drawer.[208]

C. *Padded Payrolls: § 3-405(1)(c)*

If an agent or employee of a drawer provides the name of a payee to be designated on a check, intending the payee to have no interest therein, the subsequent forgery of the payee's indorsement is effective to pass title to the instrument.[209] This rule is to apply not only to the traditional padded payroll case but in any instance when the age supplies the drawer with the name of the payee.[210]

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[206] May Dep't Stores Co. v. Pittsburg Nat'l Bank, 374 F.2d 109 (3d Cir. 1967); First Pennsylvania Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596, 1 UCC Rep. Serv. 291 (Pa. C. P. Montgomery County September 17, 1962).

[207] *See* UCC § 3-405, Comment 3f.

[208] Wright v. Bank of California, Nat'l Ass'n, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969). *See* Note, *Negotiable Instruments—The Cosignor Problem in Wisconsin—NIL and UCC,* 1961 Wis. L. Rev. 514 where it is stated that the justification for this result lies in the terminology of § 3-405(1) (b) by the use of the words "a person signing." Therefore, if at least one of the cosignors has the requisite intent that the payee is to have no interest in the check, he is "a person signing" as contemplated by § 3-405(1) (b).

[209] UCC § 3-405 (1) (c); Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970) (purchaser of cashiers check was found to have intended the payees to have an interest in the check thereby precluding the application of § 3-405 (1) (c)).

A departure from the rule embraced in § 3-405 (1) (c) arose in Delmar Bank v. Fidelity & Deposit Co., 428 F.2d 32 (8th Cir. 1970). A check was delivered to the drawer's agent under circumstances that would seemingly come within the purview of § 3-405(1) (c). After forging the payee's indorsement, the agent cashed the check at the collecting bank who transferred the check to the payor bank receiving final payment. Upon discovery of the forged indorsements, the drawer made a successful demand on the payor bank to recredit its account. The payor bank obtained restitution from the intermediary bank, who in turn, recovered its loss from the collecting bank. A demand was made by the collecting bank against its insurer on the forgery provisions of its Banker's Blanket Bond. It was held that the bond encompassed checks payable to fictitious payees and, therefore, the insurer was required to indemnify the collecting bank. The insurance company had contended that the collecting bank acted as a volunteer in reimbursing the intermediary bank, thereby creating its own loss since § 3-405 made the forged indorsement effective to pass title to the instrument. Unfortunately the court did not consider this argument since it was not raised in the lower court.

As a prerequisite to the application of § 3-405 (1) (c), there mu be an agency relationship between the one furnishing the name of t payee and the drawer of the check.[211] This is exemplified in a ca where two corporations had, on several occasions, made joint loans, ea advancing one-half of the proceeds. On one occasion, the president one of the corporations approached the other, falsely representing th he desired to procure a loan for his brother-in-law. A check was draw by the defrauded corporation, payable to the brother-in-law, and c livered to the other corporate president. After forging his brother-i law's indorsement, the president deposited the check in the corpora bank account at the collecting bank. Final payment was remitted to t collecting bank by the payor bank who debited its customer's accour An action was instigated by the drawer against the payor bank. Sectio 3-405 (1) (c) was found inapplicable and the payor bank was held liab for its payment of the check which bore a forged indorsement. The was no agency relationship found to exist between the two corporation the previous joint ventures of the corporations and their presidents w not sufficient to create an agency relationship.[212]

Once an agency relationship is found the facts must be examined determine if the employee intended the payee to have no interest in t proceeds of the check. *Hobart Manufacturing Co. v. Fidelity & Depo Co.*[213] illustrates the requirement of intent. An accountant, employ by the drawer, requisitioned checks purporting to be payable to t various creditors of the drawer. After preparation, the accountant su mitted the checks to the drawer's treasurer for signing. Checks amour ing to over $400,000 had been requisitioned by the accountant ar signed by the treasurer before the accountant's fraudulent practices we detected. It was revealed that the accountant had designated as paye various individuals to whom he was indebted. These checks were c livered to the named payees who indorsed the checks and received pa ment. An action was brought by the drawer against its insurer on t drawer's forgery bond. It was held that since the checks were not payab to fictitious payees the drawer could not recover against its insurer.

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[210] UCC § 3-405, Comment 4.

[211] *See* Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (197 Adelphia Factors, Inc. v. Bank of Old York Road, 83 Montg. Co. L.R.101 (Pa. 196 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 3-405: 11, at 936 (2d ed. 1971).

[212] Adelphia Factors, Inc. v. Bank of Old York Road, 83 Montg. Co. L.R. (Pa. 1963).

[213] 360 F.2d 453 (6th Cir. 1966).

To determine whether the checks were payable to fictitious payees, the court examined the element of intent. Section 3-405 (1) (c) compels adherence to the intent of the employee. Since the employee intended the payees to have an interest in the proceeds and to receive possession of the checks, they were not payable to fictitious payees. This case should be contrasted to the situation in which the employee intended to divert the checks and forged the payee's indorsement. An unauthorized indorsement in the name of the payee will be effective.[214]

A dichotomy in judicial construction has arisen to ascertain when an employee or agent has supplied his employer or principal with the name of the purported fictitious payee intending the payee to have no interest in the proceeds.[215] When an employee has furnished his employer with the name of a payee who is a *bona fide* creditor of the employer, the check being drawn to pay for goods or services rendered to the employer, the employee has not supplied the name of the payee within the meaning of § 3-405 (1) (c).[216] On the other hand when an agent who supplies the name of a payee who is not a bona fide creditor and the purported obligation leading to the issuance of the check is fraudulent the doctrine is invoked.[217]

Most businesses, in order to protect against the infidelity of an employee, maintain intensive internal control and accounting procedures. Such procedures normally delegate the disbursements of checks over many departments to guard against fraudulent checks. These procedures will usually require the joint action of several employees to successfully consummate a fraudulent check scheme. In one case[218] a single employee was able to effectuate a scheme culminating into his receipt of checks; the employee intended the named payees to have no interest in the proceeds. In pursuing an action against the payor bank, the employer contended that "supplied", as used in § 3-405 (1) (c), must be ascertained by determining the distance between the dishonest employee and the physical preparation of the checks. Since other departments perused the fictitious orders prepared by the employee and had to take some affirmative action, it was argued that the employee had not furnished the name of the payees but rather the drawer itself had supplied the names. Rejecting this argument and denying the drawer recovery, the court observed that "supplied" encompasses situations in which the employee starts the wheels of normal business procedures in motion to produce a check for a nonauthorized transaction.

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[214] *See, e.g.,* May Dep't Stores Co. v. Pittsburg Nat'l Bank, 374 F.2d 109 (3d Cir. 1967).

[215] Snugg Harbour Realty Co. v. First Nat'l Bank, 105 N.J. Super. 572, 253 A.2d 581, *aff'd per curiam,* 253 A.2d 545 (1969). In this case the plaintiff construction company maintained a system whereby its creditors submitted invoices to the plantiff's superintendent. After the superintendent's investigation that the creditor's alleged work was completed or materials furnished, the superintendent initiated the invoices and forwarded them to the bookkeeper who prepared a check. Certain creditors authorized the superintendent to procure their checks for delivery to them. The superintendent failed to deliver some of the checks and after forging the payee's indorsements, cashed and converted the proceeds. It was held that § 3-405 (1) (c) had no application since the superintendent did not supply the name of the payees to his employer intending the payees to have no interest in the checks. The court's conclusion was based on the fact that the payees were *bona fide* creditors of the construction company. Consequently, the payor bank was held liable to its customer, the construction company, for the checks bearing the surreptitious indorsements.

[216] *Id.*

[217] *See, e.g.,* New Amsterdam Cas. Co. v. First Pennsylvania Banking & Trust Co., 451 F.2d 892 (3d Cir. 1971).

> [W]e can find no viable place to draw the line within the business enterprise of the drawer. [T]he only rationale distinction lies between bona fide and fraudulent transactions because it is only in the case of a bona fide transaction that anyone other than a faithless employee may be said to have supplied the name of the payee to the company.[219]

V. FORGED SIGNATURE CHECKS

A. Rights and Liabilities of Payor Banks

The Code does not alter the established rule that a payor bank finally paying a check bearing the unauthorized signature of the drawer must recredit its customer account for the amount of the item improperly charged.[220] It then becomes pertinent to ascertain if the payor bank may recover the amount of its mistaken payment from some prior party.

In the normal concatenation of circumstances the check has been presented to the payor bank by a collecting or intermediary bank. As noted in the discussion on forged indorsements, each collecting bank or other party makes certain warranties to the payor which run with the instrument.[221] However, with respect to the authenticity of the drawer's signature, the warranty is limited to the extent that the party obtaining payment has no *knowledge* that the signature is not genuine.[222] Consequently, a payor bank must bear the loss from its final payment to a party having no knowledge of the unauthorized signature.

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[218] New Amsterdam Cas. Co. v. First Pennsylvania Banking & Trust Co., 451 F.2d 892 (3d Cir. 1971).

[219] *Id.* at 898.

[220] *See* Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

[221] UCC §§ 3-417 (1), 4-207 (1).

[222] UCC §§ 3-417 (1) (b), 4-207 (1) (b).

The Code has codified the rule of *Price v. Neal* by specifying that payment of a check is final in favor of two classes: (1) holders in due course; and (2) one who has in good faith changed his position in reliance upon the payment.[223] This statute, however, is expressly subject to the warranty provisions of § 3-417. There may be cases in which a holder acquires a check in circumstances to permit him to be a holder in due course, yet knowledge is obtained of the forged signature before payment or acceptance. A holder in due course who collects a check before acceptance, knowing the signature of the drawer not to be genuine, has extended and breached a § 3-417 warranty and cannot rely on the finality of payment provision.[224]

The rule, placing the loss on payor banks, has been stated to rest on various theories. One is that a payor bank has access to an exemplar of its customer's signature from the signature card signed by the drawer authorizing payment pursuant to his orders. Collecting banks and other transferors do not have access to an exemplar. As between two innocent parties, the one in the best position to protect against the loss should shoulder the burden. In fact the payor has permitted the fraud to be consummated through its own inadvertence by failing to consult the signature card of its customer and the law charges the payor bank to know the signature of its depositors.[225] This reasoning is not viable in cases when a forged signature is so skillfully executed as not to be discernable to the most careful eye. Perhaps it may be justified on the ground that a holder in due course will have an equity superior to that of the payor bank.[226]

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[223] UCC § 3-419. The rule may be stated to be that:

> [A] bank of deposit is bound at its peril to know the signature of its depositors; and while an indorser of a check for presentment guarantees all prior indorsements, it does not warrant the genuineness of the maker's signature to the drawee bank. When a holder in due course presents a check to the drawee and it is accepted, the bank cannot thereafter recover the money from the person to whom it is paid or from any of the indorsers.

Citizens Bank v. National Bank of Commerce, 334 F.2d 257, 258 (10th Cir. 1964).

[224] UCC § 3-417, Comment 4; CLARKE, BAILEY AND YOUNG, *supra* note 5, at 136.

[225] *See* First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963); Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

[226] *See* O'Malley, *Common Check Frauds, supra* note 2, at 202.

B. Defenses Available to Payor Banks

Having seen that the payor bank must normally absorb the loss precipitated by its final payment of a forged-signature check, there do exist provisions in the UCC which may insulate the payor from liability to its customer. These exculpatory provisions are found in part in § 4-406 relating to the duty of the customer to discover and report forgeries of his signature to the drawee bank.

A depositor is charged with the duty to exercise reasonable care and promptness in examining his bank statement and cancelled checks.[227] For failing to fulfill this duty, a customer is precluded, in certain situations, from demanding the payor bank to recredit his account for the improper payment. A preclusion arises if the payor bank affirmatively establishes that it suffered a loss, regardless of the amount, due to the customer's delay in reporting his forged signature on any check.[228] There will also be a preclusion if the customer fails to inform the payor bank within a reasonable time, not to exceed fourteen days, that a check has been paid which bears his forged signature and subsequent checks are paid which are drawn by the same forger. A reasonable time does not commence until the bank statement and cancelled checks, containing the initial forged item, have been made available to the customer.[229] If the payor bank is negligent in paying the items then the customer's delay in conveying notice will not bar assertion of the improper payment.[230]

To compel the prompt perusal of a customer's bank statement and the returned items supporting the debits, a controversial[231] time limit, in the nature of a hybrid statute of limitations, is imposed within which a drawer must report discrepancies to the payor bank as a prerequisite to instituting an action for the improper payment.[232] For forgeries of the drawer's signature and other alterations appearing on the face or back of the instrument, notice must be conveyed within one year after the statement and cancelled checks have been made available to the customer.[233] A three year time limitation is prescribed for unauthorized indorsements.[234] The one and three year notice provisions are absolute and apply irrespective of the negligence of the drawee bank in paying the items.[235]

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[227] UCC § 4-406 (1).

[228] UCC § 4-406 (2) (a).

[229] UCC § 4-406 (2) (b); Lawrence Fashions Inc. v. National Bank, 8 UCC Rep. Serv. 729 (N.Y. Sup. Ct. N.Y. County February 1, 1971); Gennone v. Peoples Nat'l Bank & Trust Co., 51 Pa. D. & C.2d 529, 9 UCC Rep. Serv. 707 (Pa. C.P. January 21, 1971).

[230] UCC § 4-406 (3); Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971); W. P. Harlin Constr. Co. v. Continental Bank & Trust Co., 23 Utah 2d 422, 464 P.2d 585 (1970).

[231] *See* Murphy, *Uniformity, Forged Indorsements and Comprehension—Some Observations on the Uniform Commercial Code,* 35 Miss. L.J. 356 (1964).

[232] UCC § 4-406 (4); Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

Thus, it may be said that provided that a payor bank has paid the checks in good faith, the Code mandates that a depositor discover and report irregularities promptly after the statement and returned items are made available.[236] Oral or written notice is sufficient.[237] If, however, the depositor fails to give notice to the drawer, his tardiness may be justified, upon proof sufficient to create a jury issue, and his right of recovery may not be foreclosed. Payment by the drawee must be in *good faith*; if not, the customer's right of action is not barred.[238] However, failure to give notice within the one year period, without regard to the negligence of the drawee or customer, is an absolute bar to the depositor's claim.[239]

An open question is said to exist under the UCC regarding the drawer's duty to inspect and report irregularities if the forger himself is an agent of the drawer and is entrusted with the task of examining the bank statements and cancelled checks.[240] In such cases the employee is able to manipulate his employer's records and the forgeries may go undetected for a substantial period of time. Should the knowledge of the agent be imputed to the principal? The test utilized in such circumstances has been found by alluding to prior law since the Code is silent.

Prior to the adoption of the UCC a majority of the courts, including Mississippi, held that a depositor was not charged with knowledge of the forgery possessed by the agent so as to absolutely construct a barrier to recovery. Knowledge, however, is imputed to the principal of facts that an honest agent would acquire from an impartial examination.[241]

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[233] UCC § 4-406 (4).

[234] *Id.*

[235] *See* Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[236] *See, e.g.*, Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

[237] Duralite Co. v. New Jersey Bank & Trust Co., 97 N.J. Super. 48, 234 A.2d 247 (1967).

[238] Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

[239] Davis Aircraft Prod. Co. v. Bankers Trust Co., 36 App. Div. 2d 705, 319 N.Y.S.2d 379 (1971); Billings v. East River Sav. Bank, 33 App. Div. 2d 997, 307 N.Y.S.2d 606 (1970); Stauffer v. Oakwood Deposit Bank, 19 Ohio App. 2d 68, 249 N.E.2d 848 (1969) (bank has burden of proving when notice was given).

[240] *See* CLARKE, BAILEY AND YOUNG, *supra* note 5, at 165.

From the vantage point of the minority, the knowledge of the agent of the forgery itself is chargeable to the principal and the drawee bank is not liable for forgeries subsequently discovered.[242]

The majority rule was applied in *Exchange Bank & Trust Co. v. Kidwell Construction Co.*[243] The plaintiff had employed for many years a secretary in whom he had complete confidence and trust. Checks were forged by the secretary, payable to herself, for a period of three years before her peculations were discovered. An action was commenced against the drawee for the amount of the checks forged within a one year period prior to the plaintiff's notice; the other checks were barred by the one year notice period of § 4-406 (4).

The drawee claimed that it had paid the items in good faith. Therefore, due to the fourteen day limitation as well as drawer's failure to exercise reasonable care in detecting and reporting the forgeries by allowing a dishonest employee to examine the returned statements, the drawer was precluded from pursuing his claim. Finding that an honest agent entrusted with examining the returned items and bank statement would have unraveled the forgeries, there was a breach of the depositor's duty to use reasonable care in discovering and reporting the forgeries. However, if the customer establishes lack of ordinary care on the part of the drawee in paying the items, the bank cannot assert the breach of the depositor's duty to report forgeries as a defense. Since the jury found the bank negligent in paying the forged items, the plaintiff prevailed in his claim notwithstanding his own negligence.

One court has held, inferentially, that the depositor's duty to report forgeries is not applicable where the cancelled checks returned to the customer contain checks that do not purport to be drawn against the depositor's account. Section 4-406 was said to apply to forged or unauthorized signatures of the drawer or indorser on checks drawn upon the customer's account. However, the case was resolved on the basis that due diligence of the depositor is not required when the bank is itself negligent in the first instance; the bank was negligent in charging items to its customer's account that were in fact drawn on other accounts.[244] When the drawee pays checks bearing the signature of one not authorized to draw on the account the drawee has been deemed negligent, excusing the delay of the customer's notification.[245]

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[241] *See* Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[242] Faber v. Edgewater Nat'l Bank, 101 N.J. Super. 354, 244 A.2d 339 (1968); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[243] 463 S.W.2d 465 (Tex. Civ. App. 1971).

It appears that the Code contemplates that the drawee bank must supply its customer with a bank statement and the cancelled checks supporting the debits before the time period may commence.[246] Yet in *Myrick v. National Savings & Trust Co.*,[247] the court held that a customer has a duty to inquire upon his failure to receive a bank statement and cancelled checks. In fact, the court held that the customer was negligent, as a matter of law, in not directing such inquiries. This negligence was held to preclude the customer under § 3-406 from demanding a credit from the drawee for its improper payments over the depositor's unauthorized signature. It has been submitted that the proper solution as to whether a customer should make such an inquiry should be resolved by the trier of fact and not by the court.[248]

C. *Waiver or Defense*

A drawee bank having a valid defense for delay in notification against its customer for an improper payment of a check may not waive this defense and seek reimbursement from a collecting bank or any other party.[249] Thus when a customer fails to give notice within the prescribed period or breaches his duty in tendering a prompt notification of irregularities in the checks a drawee recrediting the customer's account acts at its own peril.[250]

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[244] W. P. Harlin Constr. Co. v. Continental Bank & Trust Co., 23 Utah 2d 422, 464 P.2d 585 (1970).

[245] *Id.*

[246] Section 4-406 (1) provides:

> When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

[247] 268 A.2d 526 (D.C. Ct. App. 1970).

[248] 7 UCC Rep. Serv. Editor's Note, 1139-1140.

A payor bank may, of course, assert the defenses of negligence in substantially contributing to the placement of the drawer's unauthorized signature on the check as well as estoppel and ratification. Wilmington Trust Co. v. Phoenix Steel Corp., 273 A.2d 266 (Del. 1970) (drawer "precluded" from asserting unauthorized signature); Wiest v. National Bank, 10 Lycoming R. 125 (Pa. C.P. 1966) (drawer ratified his unauthorized signature by retention of proceeds) discussed in Annot., 23 A.L.R.3d 932, 1006 (1969); Boulevard Check Cashing, Inc. v. Copen, 7 UCC Rep. Serv. 822 (N.Y. Civ. Ct. Queens County May 7, 1970).

In the majority of situations a payor bank will not be entitled to seek reimbursement for its final payment of an item containing the drawer's forged signature. With respect to forged indorsements and material alterations the drawee will normally be permitted to collect its loss from the party obtaining payment on the basis of the warranties extended upon payment of the instrument. It is in these situations that the waiver of defenses by a payor bank against its customer will be significant.

The waiver contained in § 4-406 (5) expressly applies only to defenses arising under § 4-406. However it is feasible that a court could find that a payor bank can not waive other defenses, such as negligence, ratification or estoppel.[251] This could be obtained by resort to common law through § 1-103, the court regarding the Code as silent on the issue. A "no-waiver" rule could also be fashioned by analogy from § 4-406 (5).

VI. DOUBLE FORGERIES

Complex problems and questions arise in situations where both the signature of the drawer and payee are unauthorized; these are classified as "double forgeries."[252] The drawer is interested in having the payor bank recredit his account. If the one year time period for notice has elapsed, may the drawer demand the payor bank to recredit his account on the basis of the forged indorsement? If a drawer conveys a prompt notification within the one year period, may the payor bank seek restitution from its transferor on the basis of the warranty of good title? Commentators have disagreed as to whether the Code mandates adherence to rules relating to forged indorsements[253] or forgery of the drawer's signature.[254]

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[249] UCC § 4-406 (5).

[250] *See* Commonwealth v. National Bank & Trust Co., 46 Pa. D. & C.2d 141, 6 UCC REP. SERV. 369 (Pa. C.P. Dauphin County October 18, 1968).

[251] UCC § 4-406, Comment 5.

[252] *See* O'Malley, *Common Check Frauds, supra* note 2, at 244.

[253] CLARKE, BAILEY AND YOUNG, *supra* note 5, at 246; Note, *The Doctrine of Price v. Neal Under Articles Three and Four of the Uniform Commercial Code,* 23 PITT. L. REV. 198, 211 (1961); Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code,* 62 YALE L.J. 417, 455-460 (1953).

[254] O'Malley, *Common Check Frauds, supra* note 1, 246-247 and n. 368.

Prior to the Code the majority rule was that principles relating to forged-signature checks applied. The minority rule analyzed the rights and liabilities of the parties as if the check were one containing only a forged indorsement.[255]

Those urging that the Code compels application of forged indorsement principles base their assertions on the warranty of title provisions.[256] Notwithstanding the forged signature of the drawer, the collecting bank and other transferors have, nevertheless, breached their warranty that it had good title to the check. It is said that the Code subordinates the forgery of the drawer's signature to the forgery of the indorsement.[257]

Opponents of this proposition contend that since the UCC sanctions an indorsement by one not intended to have an interest in the check,[258] the rules relating to forgery of the drawer's signature will apply.[259] This argument presupposes that in most double forgery situations, the one forging the drawer's signature will not intend the payee to have any interest therein, thus precipitating application of the nominal payee rules. However, it has been suggested that even in a case where the nominal payee rules do not apply the results would be the same.[260]

A double forgery case arising under the UCC was presented in *Bank of Thomas County v. Dekle*.[261] The drawer detected certain checks containing his forged signature as well as the unauthorized indorsements of the payees. Notice was conveyed to the drawee beyond the time period prescribed for reporting irregularities of the drawer's signature, but within the period for reporting unauthorized indorsements.[262] Rejecting the bank's motion for summary judgment, the Georgia court held that even though the time period for reporting the forgery of the drawer's signature had elapsed, the notice of the forged indorsement was given within the statutory period, thereby entitling the drawer to assail a claim for the improper payment. Following this rationale, a drawer may elect to pursue either theory for recovery. It is interesting to note that the court did not mention the possibility of the unauthorized indorsement to be effective due to the fictitious payee provisions.

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[255] CLARKE, BAILEY AND YOUNG, *supra* note 5, at 134; O'Malley, *Common Check Frauds, supra* note 2, at 244-45.

[256] UCC § 4-207 (1) (a); CLARKE, BAILEY AND YOUNG, *supra* note 5, at 135.

[257] BAILEY, BRADY ON BANK CHECKS § 15.16, at 508 nn. 252-253 (4th ed. 1969); Comment, *Allocation Of Losses From Check Forgeries Under The Law Of Negotiable Instruments And The Uniform Commercial Code,* 62 YALE L.J. 417, at 455 n. 192 (1953); Beutal, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law,* 30 NEB. L. REV. 531, 554-555 (1951).

[258] UCC § 3-405 (1).

[259] O'Malley, *Common Check Frauds, supra* note 2, at 246-247.

[260] *Id.* at 247 n. 368. The author's conclusion is premised with the fact that the UCC adopts the usual rules applicable to warranties. UCC § 3-417, Comment 1. To recover for a breach of warranty there must be a loss. The payor bank's loss resulted from paying the check over the drawer's forged signature rather than making payment to the wrong person due to the forged indorsement. Therefore, there is no loss which is "directly traceable" to the breach of warranty of title.

[261] 119 Ga. App. 753, 168 S.E.2d 834 (1969).

Analogizing from the underlying policies emanating from § 4-406, it is submitted that application of forged-signature check principles are contemplated in a situation analagous to *Bank of Thomas County v. Delke*. The apparent purpose of § 4-406 is to require a depositor to be prompt and diligent in espying forgeries and alterations. As to discrepancies in the drawer's signature and other alterations appearing on the check, the customer can recognize his own signature or consult his records to ascertain if the cancelled checks were, in fact, his genuine orders. As to unauthorized indorsements, the drawer does not have a readily comparable access to facts which would reveal the veritableness of the indorsement. Thus, § 4-406 permits a longer period of time within which forged indorsements may be reported.[263] In a double forgery case, a drawer may demand the payor bank to recredit his account upon seasonable notice to the drawee that his signature is unauthorized. When this one year period has expired, it would seem to go against the intent and purpose of § 4-406 to permit the drawee to protest the improper payment on the basis of the presence of a forged indorsement. By a prompt perusal of his bank statement and cancelled checks, the drawer could have unearthed the forgery of his signature in the first instance.

A Mississippi case involving a double forgery may be pertinent in predicting the outcome of this problem by our court. In an action between the drawee and collecting banks, the loss was placed upon the drawee since it was deemed to have been in the best position to protect against the mistaken payment. In holding that the forgery of the drawer's signature pervades the entire transaction, the court reflected upon policy considerations stating that the final payment by the drawee must out of necessity effectively close the transaction.[264]

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[262] The Georgia version of the UCC provides that a customer must report forgeries of his signature within sixty days after the statement and cancelled items supporting the debits have been made available to the customer. Forged indorsements must be reported within one year. GA. CODE ANN. § 109A-4-406 (4) (Supp. 1971).

[263] *See* UCC § 4-406, Comment 5; Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 543, 324 N.Y.S.2d 543 (1971).

This case received considerable attention in *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*,[265] being partially overruled. It was, however, made explicit that the payor bank is to bear the loss from the final payment of a check containing the drawer's forged signature.[266] Therefore, it appears that Mississippi will continue to apply rules relating to forged-signature checks in resolving the controversy.

VII. CONCLUSION

Basically, the rules of loss allocation in the UCC are comprised of simplicity and definiteness. For cases involving forged indorsements, the Code contemplates that the drawer or payee pursue an action against the payor bank who can, in turn, obtain restitution from the collecting bank. Yet the decisional law that has developed does admit exceptions based primarily on the avoidance of circuity of action. Payor banks are required to absorb the loss from checks bearing the drawer's unauthorized signature. These general rules also encompass certain defenses which a bank may utilize in appropriate cases to shield itself from liability.

In the future there will undoubtedly be check forgery cases containing complex and intricate factual situations. The twentieth-century forger is intelligent, elusive, and shrewd. When the factual background in these cases does not appear to be encompassed by the specific provisions of the Code, it is hoped that the courts will not subordinate the salutary policies of the UCC since they represent a uniform commercial policy.

Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc. represents the only Mississippi decision involving a check forgery to which the UCC was applicable. It is perhaps lamentable that the Code was only partially respected. Although the ultimate decision was sound under the Code, the means to the end were questionable since the language of the opinion was not couched within the proper provisions of the UCC. Such decisions create confusion and difficulty which were intended to be eliminated by the UCC. In addition, the case is not a healthy precedent for a future case containing a knotty fact situation. Hopefully, there will be complete adherence to the provisions of the Code in future forgery cases.

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[264] First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963).

[265] *See supra* notes 41-42.

[266] The court reaffirms the proposition that it is the duty of a bank to know the signature of its depositors and that the payment of an instrument by a bank on a forged signature of one of its depositors effectually closes the transaction, except that if the bank can reach the person by whom the forgery was committed or one who receives the money with knowledge of the forgery. 253 So. 2d at 833 (Miss. 1971).

F. Gerald Burnett

PROBLEMS IN FACULTY DESEGREGATION

It seems ironic that problems for a black teacher arise when the school board establishes a unitary school system or instigates partial desegregation in accordance with a court order. The unnecessary duplication that existed under the dual school system may suddenly be eliminated in order to have an efficiently run system. A court faced with a teacher discharged because of this elimination of jobs, and often entire schools, is faced with two equally compelling claims. On the one hand, the school board contends that it must not only create an efficiently run system and maintain the highest quality of education that it possibly can, but it must also try to prevent "white flight" which would eventually reduce jobs and because of the corresponding increase of jobs in "private" schools, possibly drain the system of its best teachers.

On the other side is the black teacher, fostered by the dual system, who may be educationally inferior because of the prior lack of care exercised by the school board to provide a good education for black children. The school board thus may have hired teachers for black schools it would not have considered qualified for white schools. Even qualified teachers may have become unqualified simply due to frustration.[1] Once having given up and not utilized his skills for a period of time, he may have become inferior to other teachers who have utilized their skills. It is understandably difficult for such a teacher, having been "qualified" to teach in the system a considerable number of years, to understand why he should suddenly be unemployed. A person placed in such a situation may easily conclude that his discharge was racially motivated. This conclusion will probably be enhanced when he looks around and finds that the vast majority of teachers who have lost their jobs are black. He may see the job openings created by these discharges being filled by whites, a situation which only increases his belief that the school board was motivated by racism in discharging him. Once he has reached this conclusion, he is apt to bring suit. It is the purpose of this comment to discuss how the courts deal with these conflicting equities. Since a reduction in the student population and a corresponding reduction in teaching positions cannot be avoided by the school board, discussion will be limited to those areas in which the board has control.[2]

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[1] A teacher in a lower grade is apt to become frustrated when he sees the children he taught the year before move up to the next grade and learn nothing. He might also become frustrated when he realizes that the teachers at the same grade level as his are simply not teaching. In these situations he is likely to wonder why he should put forth the effort to teach effectively.

I. SCHOOL CLOSINGS

The closing of a school, particularly a previously all-black school, not only reduces the number of teachers, administrators, and staff required in the system[3] but may adversely affect those who remain, since they will have to be transferred[4] to a location which may at best be inconvenient. The closing of all-black schools also affects the previous pupils, since the burden of desegregation is placed on them.[5] Moreover, white students who continue to attend the same schools as before come to consider themselves as natives and, as a result, resent blacks as foreigners.[6] In spite of this, a school board may close a formerly all-black school, provided there are sufficient educational reasons to support the closing.[7]

In *Carr v. Montgomery County Board of Education*[8] the United States Court of Appeals for the Fifth Circuit upheld the closing of three formerly all-black schools due to either an inferior physical plant or site.[9] Other sufficient educational reasons have included the conversion of the formerly black schools into pupil development centers and vocational training centers.[10] *Mims v. Duval County School Board*[11] probably provides the most significant educational reasons for school closings. Five formerly all-black schools were closed in the ghetto section of East Jacksonville, Florida. One was "surrounded by an incinerator, a polluted creek and a poultry company creating a problem with regard to stench and sewage backing up in the school plant, producing noxious odors which even permeated the school cafeteria." It was "also located on a small site in a declining neighborhood. . . ."[12] The other schools were relatively new schools located in the midst of high crime areas. There were incidences of vandalism and intrusion. This is the first case in which environmental considerations were held to be sufficient to close black schools. More importantly, the school board had trouble in maintaining a teaching staff. Since almost all black schools in large cities are located in ghetto areas with similar conditions, it appears that metropolitan areas could close black schools with virtual immunity, thus putting the burden of integration on blacks. It must be noted that there was no evidence of racial discrimination involving the closings.

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[2] *See generally* Note, *The Negro Teacher in Desegregated Schools,* 42 N.Y.U.L. REV. 916-919 (1967).

[3] Brice v. Landis, 314 F. Supp. 974 (N.D. Calif. 1969).

[4] Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971).

[5] Brice v. Landis, 314 F. Supp. 974 (N.D. Calif. 1969).

[6] *Id.*

[7] Bell v. West Point Mun. Sep. Sch. Dist., 446 F.2d 1362 (5th Cir. 1971).

[8] 429 F.2d 382 (5th Cir. 1970).

[9] *Id.* It must be noted that the plan included the closing of some predominately all-white schools. Therefore, it could be anticipated that white students would be "in the minority in a formerly all-black school."

[10] Wright v. Board of Public Instruction, 431 F.2d 1200 (5th Cir. 1970).

[11] 447 F.2d 1330 (5th Cir. 1971).

[12] *Id.* at 1332.

When a black school is closed purely to avoid "white flight," the closing is considered to be racially motivated and therefore impermissible.[13] This is particularly true when the result is to create a burden on the entire school system as when the closing results in a "split session."[14]

The most difficult case a court must face is that in which there are valid educational reasons for closing the school, coupled with the school board's motivation to avoid "white flight." In *Gordon v. Jefferson Davis Parish School Board*[15] the school board admitted that, due to "white flight," they felt the only plan which would work was one which included the closing of a formerly all-black high school, which had been gutted by fire. The court upheld the decision to close the school, since it was patently inferior to the white high school. When the schools were somewhat equal, the Fifth Circuit reached a rather unusual conclusion. In *Lee v. Macon County Board of Education*[16] the school board argued the inferiority of the black school in the lower court, but the Fifth Circuit found that it was not inferior because it was in excellent condition. It must be noted, however, that the closing of the black school would have created an overpopulation of the white school.

When the apparent inferiority of the black school can be corrected by the expenditure of a minimal sum, the court has required that the school remain open.[17] When the school board has leased the formerly all-black school for other purposes, and the lessee has entered the premises or the board has contracted to increase the capacity of the white school to allow an increase in the student population, the court has been reluctant to hold the school open.[18]

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[13] Bell v. West Point Mun. Sep. Sch. Dist., 446 F.2d 1362 (5th Cir. 1971).

[14] *Id.*

[15] 330 F. Supp. 1119 (W.D. La. 1971).

[16] 448 F.2d 746 (5th Cir. 1971).

[17] Swann v. Charlotte-Mecklenburg Bd. of Educ., 328 F. Supp. 1346 (W.D. N.C. 1971) (where the reason for closing was that the school only had one entrance). However, the school board owned a second right-of-way which would only take the grading and surfacing or graveling of a short road to add a second entrance or exit for the school. *Id.*

While it seems that the courts are making a case by case determination as to whether all black schools may be closed, it is submitted that the following rule may be applied. Schools may not be closed (1) to prevent "white flight" or for other racially motivated reasons, or (2) when a school is closed with one of the reasons being to avoid "white flight" and the other reasons, standing alone, would not constitute valid educational reasons.

Valid educational reasons do not exist when (1) both white and black schools are in good condition; (2) the white school is in better condition, but it would require the expenditure of money in order to prevent the white school from being overcrowded, and the black school is in good condition; (3) the black school is in poor condition but would require less money to bring it into good condition than would be required to allow the white school to handle the overpopulation of students; (4) the black school may be made adequate by the expenditure of a minimal amount. Valid educational reasons exist despite the above if the school is located in an area where the faculty and/or students may be in danger.

When, however, there is a contract for construction to add to the formerly all-white school to increase its population at the expense of a formerly all-black school, or when the formerly all-black school has been leased for pupil development centers or vocational training centers and there is no showing that these pupils are not already being adequately cared for at other locations or there is no urgent reason for moving them, the court should keep the formerly all-black school open, since if it does not meet the rules supplied above, the closing must be considered racially motivated. The school board has a duty of compliance with the constitutional mandate of desegregation.[19] Therefore, neither state law nor a state-created cause of action nor the fourteenth amendment's prohibition against depriving a person of property without due process should be allowed as a defense which will result in closing a black school which was closed initially because of racial motivation.

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[18] Brice v. Landis, 314 F. Supp. 974 (N.D. Cal. 1969). The court stated in *Brice* that no great harm would result from this decision because the lease had not been finally closed.

[19] Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971).

II. Transfers

In converting from a dual school system to a unitary system, the school board must assign principals, teachers, and teacher aides so that in no case will the racial composition of a staff indicate that a school is intended for black students or for white students.[20]

Although this appears to be an easy rule to follow, in reality court decisions enforcing faculty desegregation have been far from uniform and have not established a "faculty and staff ratio in each school 'substantially the same' as that for the entire district."[21] For instance, in *Clark v. Board of Education of Little Rock School District,*[22] the ratio was 29% black to 71% white. A plan in which the number of black teachers in each school would range from 15% minimum to 45% maximum was upheld, but in *Mannings v. Board of Public Instruction of Hillsborough County, Florida,*[23] where there were 18% black to 82% white, and where there were 90% white to 10% black in the white schools, and 50% white to 50% black in the black schools, this was held not to satisfy the constitutional requirement. It is submitted that the decision which best exemplifies the rule of law with regard to faculty integration is *Bradley v. School Board of the City of Richmond, Virginia.*[24] The court there held that the ratio of black to white must substantially be the same as the ratio of black to white in the system, and that a deviation of more than 5%, when caused by an imbalance of only one faculty member will not violate the rule of approximate parity. The court further took into consideration the different levels of instruction which require "distinct training and skills." Thus, providing these different levels and applying the standard ratio to each level has provided a true ratio which allows each school to be considered a school rather than considered as a wholly black or wholly white school.

Since the board must submit a plan which has real prospects of dismantling the dual school system at the earliest practical date,[25] it appears that a plan that calls for less will not suffice.

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[20] Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211 (5th Cir. 1970).

[21] Davis v. Board of Sch. Comm'rs., 402 U.S. 33, 35 (1971).

[22] 426 F.2d 1035 (8th Cir. 1970).

[23] 427 F.2d 874 (5th Cir. 1970).

[24] 325 F. Supp. 828 (E.D. Va. 1971).

[25] Green v. County Sch. Bd., 391 U.S. 430 (1968). One of the first remedial responsibilities of the school board is the elimination of invidious racial distinctions with regard to the policies and practices relating to faculty and staff. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

The transfer must be a real one and not merely a "Hobson's choice." In *Williams v. Kimbrough*[26] two teachers were offered a transfer to a one-room school sixty miles from town. The building was not in the best condition, and the facilities were not sufficient to provide for two teachers. Instead of accepting the transfer, the teachers "quit." The court held this was, in fact, a discharge. On the other hand, a teacher may not arbitrarily refuse to submit to a new assignment, nor may he rely on state tenure laws in refusing, unless the school board can comply with the constitutional requirement as well as the state tenure laws. This seems doubtful in light of the large number required to be transferred.[27] It appears that a transfer is unreasonable, and a teacher may refuse it, when the school board knows or should know of facts about the new position which would render acceptance of the transfer unlikely. When these teachers quit, they should be lumped with the teachers who are discharged. The distance to be traveled and the condition of the school are some of the factors to be taken into consideration. This rule has the added advantage of requiring the school board to make transfers in accordance with a detailed plan rather than merely by pulling teachers' names out of a hat.

III. Demotions and Discharges

A "[d]emotion . . . includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period."[28]

When pursuant to a school desegregation order there will be a staff reduction which will result in the demotion or discharge of a teacher or principal, he "must be selected on the basis of objective and reasonable non-discriminatory standards."[29]

Teachers demoted or discharged form a pool from which the school board should draw when openings appear in their previous job classifications. The school board cannot fill the openings through recruitment of a teacher of a race, color, or national origin different from that of the teacher demoted or discharged until the one demoted or discharged who is qualified has had an opportunity to fill the opening and fails to accept.[30]

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[26] 295 F. Supp. 578 (W.D. La. 1969).

[27] Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971). Mississippi does not have a teacher tenure law.

[28] Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211, 1218 (5th Cir. 1970).

[29] *Id.*

There is a per se presumption that the teacher demoted or discharged is qualified to fill the type of position from which he was demoted or discharged. In order to rebut this presumption, the school board "would have to establish . . . lack of 'qualification' by means of objective and absolute criteria, not by means of comparison with another applicant or by means of administrative institution. The board must show . . . the former principal to be independently unqualified to assume the new opening. And in order to fulfill that burden the board would have to establish quite clearly why one who was qualified prior to a desegregation order suddenly became unqualified after the order."[31] The school board then must establish that the teacher's objective qualifications diminished in an absolute sense after the issuance of the desegregation order and his demotion or discharge.[32] This is referred to as the *Singleton* mandate.

Singleton, however, is not retroactive, and if the demotion or discharge and subsequent opening occurred prior to *Singleton,* there is no per se presumption that the demoted or discharged teacher is qualified; but pre *Singleton* law does provide that "[w]here the educational processes had historically been segregated . . . the burden" of persuasion is cast onto the "school board to prove that its hiring practices are non-discriminatory."[33] Moreover, the Fifth Circuit recognized as early as 1966 that "the displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system."[34]

When the school board is under a present order to desegregate, it is important to note that *Singleton* does not require the faculty ratio to be frozen, but after faculty desegregation has been accomplished by invoking the system-wide ratio for each school, there may be changes from time to time "as a result of non-discriminatory application of objective merit standards in the selection and composition of faculty and staff."[35] However, before any reduction in the faculty or staff may take place, the school board must develop non-discriminatory objective criteria to be used in selecting the faculty members who will be dismissed, and they must preserve the evaluation of the faculty member dismissed and make it available to him upon request.[36]

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[30] *Id.*

[31] Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1110 (5th Cir. 1971).

[32] *Id.*

[33] *Id.* at 1113.

[34] United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 893 (5th Cir. 1966).

[35] Carter v. West Felesiana Parish Schools, 432 F.2d 875, 879 (5th Cir. 1970).

Even here, though, if the complaining teacher can show a long history of discrimination in the community and a failure of the school board to desegregate until forced to do so, coupled with a disproportionate number of discharges in the ranks of the black teachers, there is an inference that the discharges were racially motivated; the burden of proof is then shifted to the school board to show by clear and convincing evidence that the discharges were not racially motivated.[37] The fact that the discharged teacher may be inferior to others in a particular school is not sufficient. The school board is required to compare them with all other teachers in the system.[38]

There is one area of conflict which has not yet been litigated. That is the possibility of discriminatory reinstatement from the pool itself. This might result when there are members of both races within the pool. It is submitted that the school board should first look to objective nondiscriminatory standards at the time the teachers are discharged. These standards should be on file with the school board. If the teachers are relatively equal, the school board should then turn to their present qualifications to determine if one has become unqualified since the discharge or if he has become more qualified (through additional schooling or by attending seminars) since his discharge. The latter requirements are harder to determine and therefore should appear clearly from the record. If the teachers are still relatively equal, the school board should look to seniority as the final determining factor. If the school board follows this procedure, there can be no charge of constitutionally impermissible motivation in rehiring.

IV. REMEDIES

When, contrary to the Singleton mandate a teacher has been discharged and the school board has not offered re-employment when there has been a subsequent opening, he is entitled to that position or a like position in the school system, and the fact that another has been hired to fill the opening does not "prevent appropriate relief by a court of equity in vindictation of the law and the Constitution."[39]

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[36] Singleton v. Jackson, Mun. Sep. Sch. Dist., 419 F.2d 1211, 1218 (5th Cir. 1970).

[37] Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Baker v. Columbus Mun. Sep. Sch. Dist., 329 F. Supp. 706 (N.D. Miss. 1971).

[38] Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La. 1969); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966).

[39] Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1112 (5th Cir. 1971).

When the teacher's discharge was racially motivated, the teacher must be given any available opening at that time. If there are no openings, the discharged teacher must be considered on a par with all other teachers now in the system. "If they are found to be superior to any, then they must be given such positions and the least qualified dismissed. If not, then they quite rightly may be refused acceptance in the system."[40]

If the teacher has found employment elsewhere, he is entitled to the difference between the two salaries plus moving expenses to his new position, and should he accept re-employment, he is entitled to reasonable expenses to move back.[41] If he is not employed elsewhere, he is entitled to back pay.[42]

The court may not deduct from this award compensation received from a second unrelated job which the teacher could have held even if he had not suffered illegal discrimination.[43] In any event, he is entitled to reimbursement of any retirement benefits he may have lost.[44] The court may also, at its discretion, award attorney's fees when the actions of the defendants were "unreasonable [and] obdurately obstinat[e],"[45] in a case alleging a firing as a result of the teacher's exercising his First Amendment rights or an action brought by the students.

THE ACTION

The action for faculty desegregation need not be brought by the faculty. It is well settled that black pupils have standing to sue because (1) "racial allocation of the faculty denies them equality of educational opportunities without regard to segregation of pupils and . . . (2) removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil desegregation."[46] The latter theory apparently allows students to challenge the discharge of teachers, although it also seems apparent that the discharged teacher will have to intervene before monetary damages could be ascertained and awarded.[47] The Equal Employment Opportunities Act of 1972 brings employees of educational institutions within the jurisdiction of Equal Employment Opportunities Commission.[48]

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[40] Williams v. Kimbrough, 295 F. Supp. 578, 586 (W.D. La. 1969).

[41] *Id.*

[42] Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1110 (5th Cir. 1971).

[43] Horton v. Lawrence Co. Bd. of Educ., 449 F.2d 793 (5th Cir. 1971).

[44] Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La. 1969).

[45] *Id.* at 587.

[46] United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 884 (5th Cir. 1966).

[47] The discharged teacher who has found employment elsewhere is entitled to the difference between his two salaries plus moving expenses to his new position. In order for the court to determine what his new salary is, if any, and his moving expenses, if any, the teacher would have to participate in order to get this information before the court. It is also submitted that as to this issue he is the only party of interest.

A. Procedure in the Absence of State Equal Employment Opportunities Law

When a teacher claims to be aggrieved by an unlawful employment practice, he must file a charge with the Equal Employment Opportunities Commission within 180 days after the practice was committed.[49] The Commission must then notify the charged party within ten days. This notice must include the date, place, and circumstances of the alleged practice.[50]

The Commission will then investigate the charge to determine if there is reasonable cause to believe that it is true. If there is not reasonable cause to believe the charge true, the Commission will dismiss the complaint, but if there is reasonable cause to believe the charge is true, the Commission must try to reach a conciliation agreement with the charged party.[51] If the Commission has been unable to reach an acceptable agreement within thirty days after the complaint was filed, it will take no further action but will refer the case to the Attorney General who may bring a civil action, and the teacher has the right to intervene in this action.[52]

If the Commission has not filed a cause of action and the Commission has not entered into a conciliation agreement within 180 days, or if the charge was dismissed by the Commission, the Commission will notify the teacher, who may then bring suit within ninety days from the date of the notice.[53] It is important to note that in case the charge was dismissed before 180 days had elapsed, the teacher must wait until that time before commencing suit.[54]

When the complainant brings the cause of action, the court may appoint an attorney for him and may authorize the commencement of the action without the payment of fees, costs, or security.[55] The court may also stay the proceedings for not more than sixty days to allow further effort by the Commission to obtain voluntary compliance.[56]

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[48] The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4 (Mar. 24, 1972).

[49] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (e) (1972).

[50] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (b) (1972).

[51] *Id.*

[52] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (f) (1) (1972).

[53] *Id.* The court may permit the Attorney General to intervene.

[54] *Id.*

After suit has been instituted by the Commission or the teacher, it is the duty of the chief judge in the district in which the cause of action is brought to designate immediately a judge to hear and determine the case.[57] It is the duty of the designated judge to assign the case for a hearing at the earliest practicable date and to cause the case to be in every way expedited.[58] If the designated judge has not scheduled the case for trial within 120 days after the issue has been joined, the judge may appoint a special master.[59]

B. *Procedure With State Equal Employment Opportunities Law*

When the state has an Equal Employment Opportunities law, no charge may be filed until sixty days after proceedings were commenced before the state enforcement body. This period is extended to 120 days during the state enforcement body's first year of existence.[60]

If the state enforcement body has a requirement for filing a complaint which is greater than the filing of a statement of facts signed by the complainant, the sixty day period will start to run from the time the teacher sends by registered mail a signed statement of facts.[61] The teacher then must file a charge with the Commission within 300 days after the alleged unlawful employment practice or within thirty days after receipt of notice that the local proceeding has been terminated, whichever is earlier.[62] After the charge is filed with the Commission, the procedure is identical to that discussed in Part A above, except that after a cause of action is filed, a district court may stay the proceedings for not more than sixty days pending the termination of the proceedings before the state enforcement body.[63]

If the teacher brings an individual action under Title VII of the Equal Employment Opportunities Act of 1964, alleging discrimination, or initiates an action alleging a firing in retaliation for exercising his first amendment rights, the action should be brought under the Civil Rights Act[64] as well as the fourteenth amendment. If brought under the latter, the teacher may be barred for failure to exhaust his administrative remedies[65] before the school board, but if brought under the Civil Rights Act, the teacher need not have pursued the board's administrative relief.[66] The school district is considered to be a person within the meaning of person in the Civil Rights Act and may be made a name defendant.[67] It must also be noted that a suit for back pay is not a claim for damages, but an "integral part of the equitable remedy for reinstatement" and, therefore, the defendant is not entitled to a trial by jury.[68]

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[55] *Id.*

[56] *Id.*

[57] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (f) (4) (1972).

[58] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (f) (5) (1972).

[59] *Id.*

[60] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (c) (1972). Mississippi does not have a local F.E.P.C.

[61] *Id.*

[62] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (e) (1972).

[63] S. Rep. No. 681, 92d Cong., 2d Sess. § 4 (f) (1) (1972).

V. FIRING

Unlike discharges discussed previously, the firing of a teacher may not occur subject to a desegregation order and the position from which he was fired can be left open. The teacher generally challenges the firing as either an act of racial discrimination[69] or of retaliation for exercising his first amendment rights,[70] or both.[71]

A teacher alleging that "he has been dismissed for constitutionally impermissible reasons 'must bear the burden' of proof."[72] This burden is not shifted until he has established that he was dismissed for constitutionally impermissible reasons,[73] or there is an "absence of factual support for the stated reasons for the . . . [school board's] action tend[ing] to prove that some other constitutionally impermissible reason underlies the action."[74] Thus when a complaint has not charged the violation of substantive constitutional rights in the non-renewal of his contract, the courts will not inquire into the reasons for the state's action or the adequacy or factual support for those reasons.[75] The teacher must allege that he has been fired for constitutionally impermissible grounds and upon trial prove that either he was fired because of this reason or that the school board had no factual basis for firing him, tending to prove the discharge was for constitutionally impermissible reasons.

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[64] 42 U.S.C. § 1983 (1970).

[65] Bonner v. Texas City Ind. Sch. Dist., 305 F. Supp. 600 (S.D. Tex. 1969).

[66] McNeese v. Board of Educ., 373 U.S. 668 (1963). Right alleged is federal in origin and supplementary to any remedy the state might have. However, it must be noted that all this might change as a result of a bill which recently passed in the Senate which would bring employees of educational institutions under the protection of EEOC and allow EEOC to enforce its findings of job discrimination in the Federal Courts.

[67] Harkless v. Sweeney Ind. Sch. Dist., 427 F.2d 319 (5th Cir. 1970).

[68] *Id.*

[69] Glover v. Daniel, 434 F.2d 617 (5th Cir. 1970).

[70] Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971).

[71] Jennings v. Meridian Mun. Sep. Sch. Dist., 453 F.2d 413 (5th Cir. 1971).

[72] Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 205 (5th Cir. 1971).

[73] *Id.* at 206.

[74] *Id.* at 209.

There is some indication that if the teacher can show that the school board's action was even partially in retaliation for his assertion of a constitutional right, he can still recover,[76] but this appears to have been rejected in a more recent case.[77] In *Sindermann v. Perry*[78] the court set up an administrative procedure which should be followed prior to bringing an action. It recommends that the teacher should, upon receipt of notice that his contract will not be renewed, and wishing to assert that the non-renewal is punishment for the exercise of his constitutional rights, notify the school board with reasonable promptness of his claim in sufficient detail to enable the school board to show any error that may exist and request a hearing. Upon receipt of this notice, the school board should constitute a tribunal that possesses some academic expertise and has an apparent impartiality towards the charges to conduct a hearing. This hearing must include the right to bring witnesses and to confront and cross-examine the school board's witnesses.

The trial court should "stay its hands until the matter has been made ripe for adjudication by allowing such procedures to run."[79]

Although the court states that the "[p]rocess is best calculated to reach a fair accord and to settle the problems that have arisen between the parties,"[80] either party may refuse to follow it, or the positions of the parties may be such that the process would be a waste of time. In either case, the process is not a prerequisite to a trial. However, due process requires that a school teacher who has tenure or a reasonable expectation of re-employment, or who has no tenure or reasonable expectation of re-employment, but alleges he has been fired for constitutionally impermissible reasons, must be provided with notice and a hearing by the school board.[81] However, the teacher who brings his action under the Civil Rights Act need not have pursued his administrative remedies.[82]

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[75] *Id.*

[76] *Id.*

[77] Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971).

[78] 430 F.2d 939 (5th Cir. 1970).

[79] *Id.* at 945.

[80] *Id.* at 944.

[81] Thaw v. Board of Public Inst., 432 F.2d 98 (5th Cir. 1970).

[82] McNeese v. Board of Educ., 373 U.S. 668 (1963).

When the teacher alleges that he was fired because he exercised his first amendment rights, a difficult case arises because the school officials are both public officials and the teachers' employers. As a teacher's employer, the school board may regulate the conduct of its employees in ways which are more restrictive than those which can be applied to citizens who are not employees.[83] With these factors in mind, the courts have tackled the problem of whether a public employee may be fired for exercising his right of free speech head on and reached the conclusion that "the answer has to be: maybe yes, maybe no."[84] The courts have attempted to balance the interests of the teacher in commenting on matters of public concern and the interest of the state as an employer in the orderly and efficient administration of education.[85]

When the employment is only tangentially and insubstantially involved in the subject matter of the communication made by the teacher, the teacher is considered a member of the public, and he may not be fired unless he has knowingly or recklessly made false statements resulting in harm.[86] A teacher's employment is generally not substantially involved when he makes statements which are not directed toward a person he normally comes in contact with in the course of his daily work,[87] since this is not likely to create a discipline problem or affect harmony of any of his co-workers not affected.[88] Thus, unless there is a material and substantial interference with the requirements of discipline, harmony or administration of the school, a teacher may not be fired for exercising his first amendment rights.

The most difficult case encountered in this area is *Glover v. Daniel.*[89] The plaintiff was a principal, forty-two years of age, with nineteen years in the system. The first instance of trouble occurred when a black principal left for a better position. A number of blacks were considered for his replacement, but a white was hired. When this was announced at the principals' meeting by the superintendent, the plaintiff strenuously objected, contending that a black should have been hired.[90] Thereafter the students from plaintiff's school boycotted to protest the hiring of the white principal. It does not appear whether all the black pupils in the system boycotted or whether the white principal was placed in a black school, although it seems that she was, since the board had just been placed under a desegregation order. The court found that the plaintiff either instigated or encouraged the boycott.

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[83] Glover v. Daniel, 434 F.2d 617 (5th Cir. 1970).

[84] Pred v. Board of Public Inst., 415 F.2d 851, 857 (5th Cir. 1969).

[85] Pickering v. Board of Educ., 391 U.S. 563 (1968).

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] 318 F. Supp. 1070 (N.D. Ga. 1969), *aff'd,* 434 F.2d 617 (5th Cir. 1970).

[90] One witness testified that he had never seen a principal talk to the Superintendent in that manner. *Id.* at 1072.

The second ground for firing was that there had been a number of burglaries in plaintiff's school. The sheriff thereafter discovered on a number of occasions that the school was left open at night and so informed the superintendent who, in turn, warned the plaintiff. Still the school was found to have been left open on a number of occasions. The court held that this reason standing alone would not be grounds for dismissal.

There was contradictory evidence as to whether the plaintiff had conducted fire drills in accordance with state law, but the court held that standing alone this would not be grounds for dismissal.

After the integration order had been issued, there were some desegregation meetings which the plaintiff was not required to attend but all other principals and his teachers attended. The court held that the plaintiff deliberately absented himself from these meetings.

It was thereafter decided that the system would go to a "non grade system"[91] pursuant to a plan to desegregate. In order to implement this system, it was necessary to give the pupils skill and achievement tests. When these tests were sent to the plaintiff's school, his students refused to take them. The plaintiff testified that he was against testing and felt that standardized tests were racially biased. The court found that either by his action or non-action he had sabotaged the test. It further found there was not a scintilla of evidence to support his suspicions that racial motives were involved in the testing.

There was one more ground for dismissal which the court held standing alone would not be sufficient for dismissal, but which did show the plaintiff's contentious attitude and suspicious nature. At a meeting to decide what text books would be utilized in the system, it was decided to utilize the same text books as before, evidently for economic reasons. The plaintiff demanded that they utilize multi-racial text books.

It can be readily seen that the plaintiff did interfere with the orderly administration of the school system. Moreover, the plaintiff was not able to introduce any proof that he had been fired for constitutionally impermissible reasons. The court held that the defendant was justified in firing him.

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[91] A "non grade system" is where the student is classified as to the number of years he has been in the system but attends class according to his ability. *Id.* at 1074.

Taking the grounds for the firing one by one in plaintiff's favor, this is what they show: On his objection to the hiring of a white principal instead of a black one, it should be noted that there was a history of segregation in the school system as evidenced from the recent order to desegregate. On a trial the school board would have to show that its hiring practices were not discriminatory.[92] It must, therefore, be presumed that the hiring of the white principal was racially motivated. If the court can make a presumption, why couldn't the plaintiff? Once it is presumed that the school board's action was racially motivated and the superintendent could not justify his action,[93] why shouldn't plaintiff be allowed to exercise reasonable and peaceful means to correct the situation when his superiors refused to do anything about it? Since the failure to keep the school locked and failure to conduct fire drills standing alone would not justify his dismissal,[94] we proceed to his failure to attend the desegregation meetings. As he was not ordered to attend, this could hardly be grounds for dismissal, even coupled with the above grounds. This brings us to the final grounds, sabotaging the tests. Here again, there was a history of segregation in the community. The board was forced to desegregate, and in accordance with this plan gave a skill and achievement test. Coupled with this, are the facts recognized by the Fifth Circuit in *United States v. Jefferson County Board of Education*[95] that a "long continued policy of faculty segregation has resulted in inferior Negro teaching and in inferior education of Negroes as a class."[96] Achievement tests administered in such a situation are very likely to have an adverse effect on blacks taking them in comparison to whites, since they have been subjected to an inferior education. Moreover, less than six months after the district court decision, the Fifth Circuit held that testing would not be employed to assign students until a unitary school system had been established.[97] In *Leman v. Bossier Parish School Board,*[98] the Fifth Circuit stated: "[I]n *Singleton* we made it clear that regardless of the innate validity of testing, it could not be used until a school district had been established as a unitary system. We think at a minimum this means that the district in question must have for several years operated as a unitary system."[99] Since plaintiff's contract was not renewed for the 1968-69 school year, the year in which desegregation was to have begun, it is crystal clear the tests were given prior to the establishment of a unitary school system and therefore were invalid for use in desegregating the system.

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[92] *Id.* at 1071. The ratio between blacks and whites in the system was approximately 50-50. There were four principals - two black and two white. It would seem that each race had an elementary school and a high school. Thus when the white principal was hired, she no doubt took over a black school. The suit for desegregation was begun after the principal was hired.

[93] *Id.* at 1072. When the black principal left, he recommended two people as his successor. The defendant did not follow his recommendations but appointed the white principal who had been a teacher in the system and had previously had experience as a principal. It does not appear whether this fact was communicated to the plaintiff and even if it were, it does not indicate whether the hiring practices were discriminatory.

[94] *Id.* at 1075. The court states that the first amendment gives a teacher the right to speak his mind, but that it does not give him the right to disrupt a school or to choose its principals or to sabotage its programs.

[95] 372 F.2d 836 (5th Cir. 1966).

[96] *Id.* at 892.

Seen in this light, when it was apparent that the "administration" was racially motivated in hiring the white principal and was illegally administering the skill and achievement tests, plaintiff's actions are more acceptable.

In those cases prior to this case dealing with a teacher's first amendment rights, the disruption of the orderly and efficient administration of education had not been motivated by apparent discrimination on the part of the school board. Since one should not be required to be a part of the defendant's apparent illegal actions, these grounds for dismissal must fall. Once these grounds are dissolved, plaintiff's case tends to prove he was dismissed for constitutionally impermissible grounds, unless the school board could show that its hiring practices were non-discriminatory.

A much better rule would be to consider both the seriousness of the teacher's misconduct and the seriousness of the school board's misconduct in determining whether the teacher should be reinstated. To hold that the teacher's disruption of the orderly and efficient administration of education bars reinstatement ignores two important considerations: First, the school board's antecedent misconduct may have been so blatant that it provoked the teacher into misconduct, and second, reinstatement is the only sanction which prevents the school board from benefiting from its apparent racially motivated action.

In this case it appears that the apparently racially motivated action of the school board prompted plaintiff's action. It is also apparent that he did not act alone but had the support of the parents of the children in his school who were equally outraged by the school board's action. To allow dismissal only causes a wider gap between the school board and the black community, and this gap will have to be bridged in order for any plan of desegregation to work.

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[97] Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211 (5th Cir. 1970).

[98] 444 F.2d 1400 (5th Cir. 1971).

[99] *Id.* at 1401.

If, on the other hand, the teacher's actions are not in response to the apparent misconduct of the school board, or reach the proportion of violence or the destruction of property, he should not be allowed to seek the protection of the first amendment.

CONCLUSION

When a school board is faced with the desegregation of its faculty, the rules that should be followed are relatively simple. The board should conduct a comprehensive review of its facilities to determine if any should be closed for sound educational reasons. The school board can then make plans for the transfers that will have to take place in order that the ratio of blacks to whites in one school approximate the ratio of blacks to whites in the entire system. It can also determine if some teachers will have to be demoted or discharged. If this will be required, the board should then develop non-discriminatory standards by which all the teachers in the system are to be rated. After the teachers have been rated, they should review them and determine who is to be demoted or discharged. If the teachers who are to be discharged are disproportionately black, the board should then review their standards to insure they are not discriminatory and with an eye toward proving it in court. They should then notify the teachers who will be demoted or discharged and offer them a hearing. If a cause of action is brought, the board should freely open its files to the plaintiffs and most importantly insure that all witnesses on their behalf testify. The board should realize that those discharged or demoted will have to be rehired when openings become available. If the board feels that these teachers are not qualified, it can protect itself by keeping them on salary under the condition they go back to school or attend seminars in order to become qualified. The discharged teacher would probably accept such an offer rather than face the uncertainties of unemployment. When such teachers return to the system, they will very likely bring with them new and better techniques of teaching and can be rotated back through the system, allowing others to be retrained in new techniques. By maintaining a constant pool of teachers, the educational process should never become static, as teachers would never become set in their ways, teaching in an outmoded manner. Also the best way to fight "white flight" is through better education rather than discrimination. Once the dual system has been abolished and a unitary system has been established, the courts only require that the board deal with its teachers in a nondiscriminatory manner.

The school board that fails to follow these rules is taking a costly risk. Court costs and back pay can amount to a considerable sum, and the teacher wrongfully discharged will have to be reinstated. If as much time, effort, and money were spent in making desegregation work as is spent in trying to avoid the inevitable, the educational system would be far better off.

The board could set up parental groups consisting of both black and white parents, preferably the leaders of each group, to attempt to adjust their differences, and, even more important, conduct student discussion groups. The board must realize that it is merely a "go between," and that it is responsible to both the black and white communities. The board is merely a means by which education is implemented, and its duty is to all children. The essence of the problem is that the board does not realize its role in the community but appears to place self-preservation above the public interest. By adhering to the law and realizing its true role, the public interest will be served, and desegregation will only be a minor problem.

James S. Macdonald

RECENT DECISIONS

CONFLICTS OF LAWS — INTRAFAMILY TORT — LAW OF FORUM APPLIES IN TORT ACTION INVOLVING FAMILY IMMUNITY DOCTRINE

A nonresident widow and her unemancipated daughter brought an action against the administrator of the estate of the deceased husband and parent and his insurance company for personal injuries sustained as a result of deceased's alleged negligence in operation of an automobile in which complainants were passengers.[1] The respondents moved to dismiss the action on the grounds that the Mississippi law prohibits civil suits in tort among members of a family[2] and that the Mississippi law is applicable in the present case. The complainants contended that Louisiana law should be administered by the Mississippi court, thus allowing a wife and daughter to sue the estate of the husband and parent and also allowing deceased's insurance company to be joined as a party defendant.[3] The chancery court adopted the respondents' position and entered a decree dismissing the action. On appeal to the Mississippi Supreme Court, *held,* affirmed. A Louisiana wife and unemancipated daughter cannot sue the husband and father for personal injuries caused by his negligent driving in a Mississippi court, and Louisiana's interests and procedural laws are not sufficient to overcome the settled policy and interests of the forum state. *McNeal v. Administrator of the Estate of McNeal,* 254 So. 2d 521 (Miss. 1971).

The weight of judicial authority upholds the family immunity doctrine in tort actions between husband and wife or parent and child, but an increasing number of courts are questioning the doctrine's validity.[4] The interspousal immunity doctrine is basically an offspring of the English common law,[5] but its origins can be traced to Biblical history, Roman law, and the natural law conceptions of the family as a unit.[6] The common law immunity was altered somewhat in 1844 when the Married Women's Acts were passed, establishing a separate legal identity for a married woman and thus destroying the concept that a husband and wife were one legal entity and allowing suits for certain causes of action.[7] As a result the courts have allowed tort actions involving property rights,[8] but less than half the courts which have considered the question permit personal tort actions between spouses.[9] The parent-child immunity for personal torts was never reported in the common law courts or courts of England, even though common law permitted property and contract suits; however, most authorities agree that there was no rule to prevent such actions.[10] The immunity was first recognized in this country by a Mississippi court in *Hewellette v. George*,[11] when the court, without citing authority, dismissed a child's action for false imprisonment against her mother on the grounds of "sound public policy" and "the peace of the society." As was the case of the interspousal immunity, the courts have generally allowed actions between a parent and child in property matters, but very few have allowed actions for personal torts.[12] In application of both immunities, the courts have generally based their opinions upon several policy arguments. The most common is the fear that to allow such actions would disturb the peace and harmony of a family and impair parental discipline and control.[13] Various other reasons supporting the immunities have included adequacy of remedy in criminal and divorce laws, the danger of fraudulent claims, and a fear of trivial suits and a deluge of litigation.[14] Nevertheless, many exceptions have been developed to avoid the harsh consequences resulting from a strict application of the rule.[15] A movement toward complete abolition of the immunity began with Justice Harlan's dissenting opinion in *Thompson v. Thompson,*[16] and at present sixteen jurisdictions have construed the Marital Women's Acts to authorize an action for personal injuries between spouses.[17] Abrogation of the parent-child immunity has been slower in developing, probably because of the absence of any statute, such as the Married Women's Acts, which could be construed to permit a suit. Yet in 1963 Wisconsin took the lead in declaring that the parent-child immunity was abolished in that jurisdiction,[18] and subsequently eleven other jurisdictions have followed suit.[19]

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[1] The logic behind complainants' decision to bring suit in Mississippi is unclear. By choosing to bring the suit in Mississippi, complainants thereby destroyed their right to maintain a cause of action. If they had brought the suit in Louisiana, their right of action would have been complete, at least against the insurance company, since Louisiana law permits a direct action against the insurance company. Complainants would also have had the advantage of being able to sue in the place of their domicile. The case itself gives no basis for the complainants' choice of forum.

[2] Mississippi still applies the family immunity doctrine in negligent or intentional tort actions between members of a family. This doctrine denies a cause of action between spouses and also between a parent and child.

[3] A Louisiana statute permits a party to bring a direct action against the insurance company of the insured. The statute provides:

> The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or insurer....
> LA. REV. STAT. § 22:655 (Supp. 1972).

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[4] *See generally* A. EHRENSWEIG, A TREATISE ON THE CONFLICT OF LAWS § 221 (1962); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971) [hereinafter cited as PROSSER]; McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930); Herskowitz, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine,* 21 U. MIAMI L. REV. 423 (1966); McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959).

[5] At English common law neither spouse could sue the other in tort, since the husband and wife were considered one legal person. It therefore followed a person could not sue himself. *See* Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27 (1877). In a later case the court indicated that at common law the husband and wife were regarded as one, the legal existence of the wife being merged in that of the husband during coverture. Thompson v. Thompson, 218 U.S. 611 (1910). This point was reiterated in a Mississippi case when the court said that a wife suing her husband "would be like the husband taking money out of one of his pockets and putting it back in another." Austin v. Austin, 136 Miss. 61, 62, 100 So. 591, 592 (1924).

[6] Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952). Here the court said:

> [T]he historical basis of these rules is a mixture of the Biblical and Medieval metaphysics, the position of the father of the family in Roman law, the natural-law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism. [*Id.,* 107 N.E.2d at 341].

[7] A typical statute is MISS. CODE ANN. § 452 (1956), which simply provides: "Husband and wife may sue each other."

[8] *See* McCurdy, *Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other,* 2 VILL. L. REV. 447, 465 (1957); McCurdy, *supra* note 4, at 1037-1038; McCurdy, *supra* note 4, at 313.

[9] PROSSER, § 122 at 861-862; *see, e.g.,* Thompson v. Thompson, 218 U.S. 611 (1910); Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963); Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967); Monk v. Ramsey, 443 S.W.2d 653 (Tenn. 1969); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969).

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[10] PROSSER, § 122 at 865; McCurdy, *supra* note 4, at 1059-62. Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 832 (1956), indicates that various courts have concluded that the lack of cases implies that no cause of action was permitted, whereas others reason that the absence of cases shows there was no bar to a cause of action. In Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), the court said there was a bar at common law; however, the Washington Supreme Court later repudiated the statement. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1959).

[11] 68 Miss. 703, 9 So. 885 (1891).

[12] *See, e.g.*, Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Hill v. Graham, 424 P.2d 35 (Okla. 1967).

[13] A representation of the policy argument appearing in the many decisions dealing with the matter is given in Corren v. Corren, 47 So. 2d 774 (Fla. 1950). The court held that a wife could not sue her husband for injuries received from the negligent driving of their daughter, to whom he entrusted the car. The court said that "when one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home." The court further said that "the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of the offspring blighted if bickerings blossomed into lawsuits. . . ." *Id.* at 776.

[14] *See* McCurdy, *supra* note 4, at 1050-54, 1072-77; Herskowitz, *supra* note 4, at 430-39.

[15] A decision which prompted an exception for intentional torts was Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), in which the court denied a 15-year-old child a right to sue her father after he had brutally raped and beaten her. Other exceptions have allowed a suit when one of the parties has died, when a child has been hurt in the course of business rather than in personal activity, and in antenuptial torts. PROSSER, §122 at 863-64, 867. *See* Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970), wherein the court held that the parental immunity doctrine does not apply when the plaintiff is a minor stepchild of the defendant who supported the

In the instant case the court noted that both common law and the majority of state jurisdictions deny the right of intrafamilial suit in tort. The court cited *Austin v. Austin,*[20] in which the Mississippi Supreme Court adopted the interspousal immunity doctrine, and *Hewellette v. George,*[21] wherein Mississippi took the lead in establishing the parent-child immunity. The court reasoned that this immunity was necessary to preserve harmony and domestic accord in the family unit and to change the rule would require legislative action. Furthermore, since no

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plaintiff, but was under no legal obligation to do so, and the plaintiff was entitled to sue the defendant for the wrongful death of the plaintiff's mother in an automobile accident.

[16] 218 U.S. 611 (1910).

[17] These jurisdictions include: Alabama, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Arizona, Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952) (stating the Arizona rule); Arkansas, Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W. 2d 696 (1931); Colorado, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Connnecticut, Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Kentucky, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); New Hampshire, Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); New York, Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); North Carolina, Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); North Dakota, Fitzmaurice v. Fitzmaurice, 762 N.D. 191, 242 N.W. 526 (1932); Ohio, Damm v. Elyria Lodge No. 415, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Oklahoma, Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914); South Dakota, Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); South Carolina, Prosser v. Prosser, 114 S.C. 45, 102 S. E. 787 (1920); Utah, Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954); Wisconsin, Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

[18] Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Followed in Ertl v. Ertl, 30 Wis. 2d 372, 141 N.W.2d 208 (1966).

[19] These jurisdictions include: Alaska, Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Arizona, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); California, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Hawaii, Tamashiro v. DeGama, 51 Haw. 74, 450 P.2d 998 (1969); Illinois, Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Kentucky, Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Minnesota, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); New Hampshire, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); New Jersey, France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); New York, Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); North Dakota, Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

[20] 136 Miss. 61, 100 So. 591 (1924).

[21] 68 Miss. 703, 9 So. 885 (1891).

cause of action can be maintained against the husband and parent, no cause of action may exist against the husband and parent's estate,[22] despite the fact that his liability insurance covers a judgment against the decedent. The court therefore concluded that the wife and child had no right to maintain a civil suit in tort against the husband and father, if living, or his estate or insurance company, if deceased.

In the general area of torts and specifically intrafamilial torts, the courts have traditionally applied the law of the place of the wrong, *lex loci delicti,* in a conflict of laws question,[23] notwithstanding the fact that the courts have usually looked to the law of the domicile, *lex domicilii,* to resolve questions of family relations or status.[24] This rule has been traced[25] to *Dennick v. Railroad Company,*[26] which applied the theory developed by Joseph Beale that the rights and duties "vested" in the parties at the time of the tort and followed them wherever they might go.[27] This rule was characterized in the Alabama case of *Dawson v.*

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[22] The court based this conclusion on the earlier Mississippi decision of Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961), which denied a wife's action against her deceased husband's estate. The court also quoted from the case of Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33, 35 (1940), in which the Wisconsin Supreme Court said:

> [I]t is, to say the least, shocking to our concept of justice that an unemancipated child, who has no cause of action against his living parent, may, if the parent die, and contingent upon such event, have a cause of action against the parent's estate or his administrator. . . . To deny an unemancipated child the right to sue his living parent for the latter's negligence and to grant him the right to maintain such an action against the parent's estate or his administrator, in case the parent dies, should not, in our opinion, be permitted, in the absence of a statute authorizing such action. Practically all of the courts of this country hold that the fact that the parent is insured, does not give rise to a cause of action based on the parent's negligence where no cause of action exists against the parent if not insured. [*Id.,* 294 N.W. at 35].

[23] "If a cause of action in tort is created at the place of the wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of the wrong, no recovery in tort can be had in any other state." RESTATEMENT OF CONFLICTS OF LAWS §384 (1934); *see, e.g.,* Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

[24] *E.g.,* Lamar v. Micou, 112 U.S. 452 (1884); *In re* Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945); Moore v. Saxton, 90 Conn. 164, 96 A. 960 (1916); Shick v. Howe, 137 Iowa 249, 114 N.W. 916 (1908); *In re* Troemper's Estate, 160 Kan. 464, 163 P.2d 379 (1945); Gray v. Holmes, 57 Kan. 217, 45 P. 596 (1896); *In re* Youmans', 218 Minn. 172, 15 N.W.2d 537 (1944).

[25] Comment, *The Second Conflicts Restatement of Torts: A Caveat,* 51 CALIF. L. REV. 762, 763-64 (1963).

[26] 103 U.S. 11 (1880).

[27] *See, e.g.,* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Bain v. Northern Pac. Ry., 120 Wis. 412, 98 N.W. 241 (1940); G. STUMBERG, PRINCIPLES OF CONFLICTS OF LAWS (3d ed. 1963).

Dawson,[28] wherein the court looked to the *lex loci delicti* in denying a wife's cause of action against her husband. In most American jurisdictions the courts have held that the rule of *lex loci delicti* shall apply regardless of the law of the forum.[29] The first case to depart from the traditional rule was *Emery v. Emery*,[30] in which the court separated the family immunity problem from the tort issue and applied the law of the parties' domicile. A leading case advocating the domicile rule was *Haumschild v. Continental Casualty Co.*[31] The court held that the capacity to sue, from the point of view of both logic and public policy, was more properly governed by the principles of family law, in which the law of the domicile usually prevails. The basic reason for this movement away from a strict application of the *lex loci delicti* is that the place of the injury has no relevant interest in the particular issues and parties of the suit, and the state of the family's domicile possesses the primary responsibility of governing the family's interest.[32] The movement is continuing, and though the courts have refused to strictly apply the law of the parties' domicile, the majority have generally agreed that the forum must make a subjective analysis of all the facts and interests involved. Such an analysis is necessary to determine what law is more appropriate to govern the parties' rights and liabilities in intrafamily tort issues.[33] In 1968 the Mississippi Supreme Court in *Mitchell v. Craft*[34] articulated and applied some basic factors and interests to be considered in this analysis.[35] These include the following: (1) The predictability of the results; (2) the maintenance of interstate order; (3) the simplification of the judicial task; (4) the advancement of the forum's interests; and (5) the court's preference as to what it regards as the somber rule of law. At present sixteen jurisdictions have modified the rule for a strict application of the law of the place of the tort,[36] and the trend is shifting toward a complete abrogation of the rule.

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[28] 224 Ala. 13, 138 So. 414 (1931).

[29] STUMBERG, *supra* note 27, at 181-82.

[30] 45 Cal. 2d 421, 289 P.2d 218 (1955). The court reasoned that the family immunity problem, being especially concerned with the family relationship, was more properly determined by the law of the state of the family domicile. However, this case was only a partial departure from the original rule, since the court indicated in its opinion that the law of the place of the wrong controlled in determining the existence of the tort cause of action.

[31] 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The *Haumschild* decision is prototypal of the modern trend in conflicts in both tort and immunity issues. This trend is is also reflected in the SECOND RESTATEMENT OF CONFLICTS OF LAWS which provides that the controlling law is that of the state having the most significant relationship with the occurence of the parties and with the parties, and later stating that whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145, 169 (1969).

[32] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

[33] *See, e.g.*, W. COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 248-51 (1942); EHRENSWEIG, *supra* note 4, at § 221; Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws*, 15 U. PITT. L. REV. 397, 423-26 (1954); Hancock, *The Rise and Fall of Buckeye v. Buckeye*, 1931-1959; *Marital Immunity for Torts in Conflicts of Laws*, 29 U. CHI. L. REV. 237, 269-74 (1962).

[34] 211 So. 2d 509 (Miss. 1968).

[35] *Accord*, Dorion v. Dorion, 241 A.2d 372 (N.H. 1968); *See* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 282 (1966).

In the instant case the court made no reference to the "center of gravity" rule on which the appellant relied,[37] but it did analyze to some extent the interests of the parties and forum and applied two basic premises in upholding the forum interests over those of the parties. The court stated that foreign law will not be given effect when it is contrary to the settled policy of the forum, and that Mississippi's well-settled policy against intrafamilial suits in tort will prevail over Louisiana's law to the contrary.[38] The court further reasoned that since the *lex fori* prevails in laws which are remedial in nature, Mississippi law will control over the procedural Louisiana law.[39] The court therefore concluded that the interests of the forum state are such that the forum law should be applied.

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[36] These jurisdictions include: Indiana, Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Alaska, Armstrong v. Armstrong, 441 P.2d 699 (Alas. 1968); Arizona, Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); California, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); District of Columbia, Myers v. Gaither, 232 A.2d 577 (D.C. Cir. 1967); Iowa, Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Kentucky, Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Minnesota, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Mississippi, Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); New Hampshire, Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); New Jersey, Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); New York, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (Ct. of App. 1963); Oregon, Casey v. Manson Construction and Engineering Co., 247 Or. 274, 428 P.2d 898 (1967); Pennsylvania, Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Rhode Island, Woodward v. Stewart, 243 A.2d 917 (R.I. 1968); Wisconsin, Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[37] Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). This case involved a choice-of-law problem in an action for wrongful death resulting from an auto accident in Louisiana, in which plaintiff's and defendant's decedents were killed. Both were domiciled in Mississippi, and their estates were being administered there. The court in its opinion modified the previously existing rule of Mississippi, in which the *lex loci delicti* was strictly applied, and it held that Mississippi law was applicable in light of the substantial relationships of the parties and the dominant interests of the forum. The court further said this holding was only a modification and not an overruling of earlier cases applying the *lex loci delicti*.

[38] Since Louisiana's family immunity is personal and remedial in nature, there may be suits directly against the deceased spouse's insurer or against his estate. These suits are allowed, since the Louisiana courts recognize a cause of action between spouses, though they fail to recognize a right of action. This denial of a right of action has been defined as merely procedural and personal in nature and doesn't apply to anyone outside the family, including the insurer. This right to sue an insurer is specifically allowed in LA. REV. STAT. §22:655 (1959).

[39] The question in the instant case is whether the Louisiana Direct Action Statute, LA. REV. STAT. §22:655 (1959), is procedural or substantive in nature. The

Society has a definite interest in preserving the basic family unit from fear of liability from personal injury resulting from the intimacy of daily living. Society also has an interest in providing a right to compensation to persons injured by another's negligent or intentional acts.[40] Where these policies conflict, the Mississippi courts have upheld the interests of the family by denying intrafamilial tort actions.[41] The instant case is the most recent addition to the chain of Mississippi cases which hold to this immunity in order to preserve domestic harmony;[42] however, the logic of the court's traditional position must be questioned in light of the modern trend of other courts' decisions. The mere presence of a tort action suggests that the peace and harmony of the family has been disrupted, and the denial of a tort action will not restore or preserve a peace which is not there. Discord does not lie in the court proceeding, but in the wrong which caused it.[43] In a suit against the estate of a spouse or parent, there is little logic to the argument that harmony will be destroyed. With the death of the party spouse there is no longer any domestic harmony to be protected.[44] The courts have cogently observed

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Mississippi courts first construed this statute as being more than a procedural right and therefore enforceable in this state. Burkett v. Globe Indem. Co., 182 Miss. 423, 181 So. 316 (1938). But in McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 So. 305 (1939), the court said even though the forum has the right to decide whether a foreign law is procedural or substantive, the settled policy in Mississippi is to follow the construction given by the courts of the state which enacted it. In this case the Louisiana courts had construed the direct action statute as procedural, and the Mississippi courts followed. Chief Justice Smith went into a lengthy dissenting opinion denouncing the court's decision and saying that when a right of action is allowed or denied, there is a substantive question, not one of mere procedure.

[40] 21 VAND. L. REV. 595, 599 (1968).

[41] Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961); Tobias v. Tobias, 225 Miss. 392, 83 So. 2d 638 (1955); Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955); Deposit Guaranty Bank & Trust Co. v. Nelson, 212 Miss. 464, 54 So. 2d 476 (1951); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Austen v. Austen, 136 Miss. 61, 100 So. 591 (1924).

[42] Cases cited note 42 *supra.*

[43] *See* Herskowitz, *supra* note 4, at 431-33; 35 MISS. L J. 308, 309 (1964).

[44] Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961). *See also,* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951), the husband shot himself and his wife and left a minor daughter. The court, allowing the administrator of the wife's estate to maintain an action against the husband's executor stated:

> Today the immunity can be based solely upon the ground that domestic tranquility is fostered by the prohibition of actions by a wife against her husband. An immunity based upon the preservation of matrimonial harmony can have no pertinence in this case, for here the marriage has been terminated, husband and wife are both dead, and action is brought for the benefit of a third person. [*Id.,* 101 N.E. 2d at 549].

that in reality a modern lawsuit of this nature is not against a member of a family but is against an insurance company. Because of the insurance, there is no problem of marital discord or financial harm, and therefore no actual threat to the peace and harmony of the home exists.[45] This question of intrafamilial immunity becomes further complicated in a conflict of laws situation, as in the instant case. In this case the court wisely did not apply the *lex loci delicti* as required by the traditional rule of torts, but analyzed the interests of the forum and the parties involved to determine the applicable law. This analysis followed *Mitchell v. Craft,*[46] wherein the court modified the traditional rule of *lex loci delicti* and considered the various interests of the parties and forum to see which law was appropriate. The court's conclusion that the forum interests were predominant over those of the domicile of the parties is in keeping with *Mitchell v. Craft,*[47] which upheld another state law in light of the forum's interests. But this conclusion is one which should be examined. Many legal writers and courts have argued very persuasively that in a conflict of law question involving an intrafamilial tort, the domicile is more important in determining whether the suit should be permitted. It is contended that the domicile state has the responsibility for establishing and regulating the incidents of the family relationship. Furthermore, it is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents. It is undesirable that rights, disabilities, and immunities conferred or imposed by family relationships should constantly change as members of a family cross state boundaries during temporary absences.[48] In the only reported cases which have had a similar fact situation, the law of the domicile has been applied.[49] The issues and their accompanying rules in the instant case are undergoing a reexamination by many courts throughout the country in light of the new arguments presented. This examination is wise and should be undertaken by this and every other court, lest they overlook some important and substantive points which should be given proper consideration.

George Fair

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[45] Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (action by wife for assault and battery and false imprisonment); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) (wife seeking damages for false arrest and false imprisonment); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (automobile accident).

[46] 211 So. 2d 509 (Miss. 1968).

[47] *Id.*

[48] *E.g.* Emory v. Emory, 45 Cal. 2d 421, 289 P.2d 218 (1955). *See* COOK, *supra* note 33, at 248-51; EHRENSWEIG, *supra* note 4, at § 221. *See generally* Ford, *supra* note 33, at 397; Hancock, *supra* note 33, at 237.

[49] Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

CRIMINAL LAW — ADMISSIBILITY OF VOICEPRINTS — VOICEPRINTS ARE ADMISSIBLE TO CORROBORATE AURAL VOICE IDENTIFICATION

Petitioner, charged with murder in the first degree, appealed from a state district court order discharging her application for a writ of habeas corpus based on an allegedly insufficient showing of probable cause for the issuance of arrest and search warrants. The showing of probable cause consisted of an aural voice identification of appellant's voice,[1] corroborated by a voice identification by voiceprint comparisons,[2] as the voice of an unknown telephone caller who had lured a police officer to his death.[3] On appeal to the Supreme Court of Minnesota, *held,* affirmed. Voiceprints, or spectrograms, are sufficiently accepted as reliable to be admissible to corroborate aural voice identifications if the expertise of the witness preparing and comparing the spectrograms is established. *State ex. rel. Trimble v. Hedman,* ..... Minn. ....., 192 N.W. 2d 432 (1971).

Prior to this decision appellate courts, while rejecting claims that the compulsion of an accused to give a tape recording of his voice for use in making a voiceprint is a violation of the self-incrimination privilege,[4] have refused to admit the identifications on various relevancy grounds.[5]

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[1] Identification testimony based on the sound of a person's voice is direct evidence of identity and therefore admissible. *See, e.g.,* Hurst v. State, 240 So. 2d 273 (Miss. 1970).

[2] The voiceprint, which is produced by a spectrograph, is a visual record of speech. This record has been used to identify unknown speakers through voiceprint comparisons of certain characteristics in the voices of known speakers with the same characteristics in the voice of the unidentified speaker. The identifications so obtained are allegedly highly accurate and not subject to error from attempts to disguise the voice. For a full discussion of the voiceprint technique see 19 AM. JUR. PROOF OF FACTS *Spectrogram Voice Identification* 423 (1967); L. Kersta, *Speaker Recognition and Identification by Voiceprints,* 40 CONN. B.J. 586 (1966).

[3] After approval by the district judge, a tape recording of petitioner's voice was obtained surreptitiously while she was discussing eligibility factors for her A.F.D.C. payments with a police officer disguised as an employee at the welfare office. This recording was used to prepare a voiceprint of defendant's voice for comparison purposes.

[4] The courts have held that the sound of a voice, the characteristic upon which the voiceprint depends, is a physical characteristic outside the protection of the privilege. *See, e.g.,* People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); *accord* State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967); State v. McKenna, 94 N.J. Super. 71, 226 A.2d 757 (Essex Co. Ct. 1967).

[5] The function of relevancy in these cases is to assure the trustworthiness of the evidence. J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF §220 (3d ed. 1937).

Nevertheless, a military court found the voiceprint admissible on the ground that neither infallibility of result nor unanimity of scientific opinion was required for admission. United States v. Wright, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967). The military court differed in approach from other early cases in its willingness

When evidence sought to be introduced is an expert opinion founded on results obtained with a scientific device, the relevancy question is whether the particular device is generally accepted[6] as dependable for the proposed use by the profession concerned.[7] The early rejections of spectrogram identification grew out of a refusal of the courts to judicially notice[8] the voiceprint as scientifically accepted for use in voice identification, coupled with a failure of the prosecution to prove general scientific acceptance.[9] Evidence introduced to this end in the earlier cases overwhelmingly showed a lack of scientific acceptance of the device. Once a sufficient showing of scientific acceptance has been made, or judicial notice is taken thereof, the prosecution must demonstrate that the device used was in good condition and that the witness was qualified

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to accept the claims of a *single scientist* that the voiceprint is reliable in the face of contrary evidence when other evidence tends to show a lack of scientific acceptance, such an approach can easily lead to the admission of unreliable scientific evidence.

In an unreported portion of *People v. Straele,* a New York trial judge held that the question of scientific acceptance of the voiceprint was for the jury, who should determine the accuracy of the device and ultimately the weight of the evidence. Note, *Voiceprint Method of Identification—Reluctance of the Courts Toward Acceptance of Scientific Evidence,* 12 N.Y.L.F. 501, 510. While statistical accuracy is a credibility question, the jury are not qualified to determine the question of general scientific acceptance, which is a question of admissibility for the court.

[6] C. McCormick, Handbook of the Law of Evidence § 171 (1954). The handling of the problem of scientific acceptance by some courts in requiring virtually unanimous scientific acceptance of a device as a prerequisite to admissibility has been criticized as more pertinent in cases in which judicial notice of scientific acceptance is requested. *Id.* There are cases holding that general scientific acceptance does not require unanimous acceptance of a technique and the lack of such acceptance goes to the weight of the evidence. *See, e.g.,* McKay v. State, 155 Tex. Crim. App. 416, 235 S.W.2d 173 (1950). An example of the former approach is Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[7] J. Wigmore, *supra* note 5.

[8] Judicial notice, a substitute for evidence, is only proper for matters of common knowledge and for facts capable of such certain verification as to be indisputable among reasonable men. C. McCormick, *supra* note 6, §§ 324-325. When the voiceprint reaches the point at which scientific acceptance is not subject to reasonable dispute, judicial notice of the technique's general scientific acceptance may be taken, obviating the necessity of formal proof.

[9] People v. King, 226 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968) (holding witness incompetent due to lack of scientific acceptance); State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967); *on remand* 99 N.J. Super. 323, 239 A.2d 680; *aff'd* 56 N.J. 16, 264 A.2d 209 (1970) (holding scientific acceptance inadequate to permit judicial notice). In the latter case, the trial court on remand failed to consider the possibility that the voiceprint was proven sufficiently accurate to be admissible without regard to the judicial notice question. Thus the decision was technically on the wrong grounds though the result was undoubtedly correct.

for its use by training and experience.[10] Following the showing of competency of the witness, scientific evidence should be admitted.[11]

In the instant case the Supreme Court of Minnesota noted that the voiceprint would complement voice identifications by ear and make them more reliable, provided the spectrograms were prepared and interpreted by trained examiners. The court pointed out the increased scientific acceptance of the device as a means of voice identification. Therefore the court, without expressing opinion as to the admissibility of the voiceprint standing alone, held the voiceprints admissible, so long as taken by a trained technician, to corroborate or impeach voice identifications by ear. The court indicated that questions of the statistical accuracy of identifications by voiceprint should not affect the admissibility of the evidence, since those are questions of credibility. The court found self-incrimination arguments based on the surreptitious taping of the accused's voice insubstantial, terming the voice a physical characteristic outside the purview of the fifth amendment.[12] Accordingly, the court concluded that the requirement of probable cause for the issuance of arrest and search warrants was satisfied, and the writ of habeas corpus was properly discharged.

While the ruling in the instant case was the first appellate decision finding the voiceprint admissible, no novel principles of law were involved. The decision represents a change in the scientific opinion toward the use of the voiceprint for identification from an unfavorable view[13] to a generally favorable one.[14] While the court in the instant case expressed no opinion on the admissibility of the voiceprint standing alone, inferentially the court has endorsed the voiceprint as a reliable scientific means of identification. Any other reading of the opinion would create the evidential monster of evidence sufficiently reliable on the identity question to permit admission for corroboration or impeachment of aural identifications, but insufficiently accurate to permit admission on the question of identity standing alone. On the basis of the shift in scientific opinion, other courts may be expected to welcome the voiceprint as an additional weapon in the unending search for truth.[15]

David S. Raines

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[10] J. WIGMORE, *supra* note 5.

[11] An excellent example of this approach to relevancy and competency, following judicial notice of a technique's scientific acceptance is State v. Graham, 322 S.W.2d 188 (Mo. App. 1959).

[12] *See* Schmerber v. California, 384 U.S. 757 (1966).

[13] B. Kamine, *The Voiceprint Technique: Its Structure and Reliability*, 6 SAN DIEGO L.R. 213 (1969).

[14] A discussion of the present scientific attitude toward voiceprint identifications may be found in United States v. Raymond, 337 F. Supp. 641 (D.C. Cir. 1972).

[15] Recently a federal district court found the voiceprint admissible after proof on facts very similar to those in the instant case without a corroborating aural voice identification. United States v. Raymond, 337 F. Supp. 641 (D.C. Cir. 1972).

CRIMINAL PROCEDURE — SELF-INCRIMINATION — MINOR'S REQUEST TO CONSULT PARENTS BEFORE INTERROGATION IS CONSTRUED TO BE AN INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE UNDER MIRANDA

Appellant, a sixteen-year-old minor,[1] was prosecuted in a California state court on two counts of murder and a third count of assault with intent to commit murder. After the arrest and before the interrogation, appellant's request to see his parents was refused.[2] After advising appellant of his rights under *Miranda v. Arizona*[3] and after receiving from appellant a knowing waiver of these rights, the police interrogated him and obtained a confession.[4] Appellant contended that the confession was unlawfully obtained since his request to see his parents invoked his fifth amendment privilege under *Miranda*.[5] The prosecution argued that appellant did not give clear notice that he was asserting the privilege, because it was unlikely that the police would understand the request to see his parents as an invocation of the privilege. In the trial court appellant was found guilty as charged on the two counts of murder and sentenced.[6] The intermediate appellate court affirmed.[7] On appeal to the California Supreme Court, *held,* reversed. When a minor is taken into custody and is subjected to interrogation without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor desires to invoke his fifth amendment privilege. Such invocation will render any confession obtained by subsequent questioning inadmissible. *People v. Burton,* 6 Cal. 3d ——, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

The fifth amendment provides that "[n]o person shall . . . be compelled in any Criminal Case to be a witness against himself. . . ."[8] In 1964 the Supreme Court decided that the fourteenth amendment's due process clause applies the fifth amendment to the states as well as to the federal government.[9] Before *Escobedo v. Illinois*[10] the Court had developed the general rule that a confession obtained involuntarily by physical or psychological coercion was inadmissible.[11] The Court qualified the voluntary-involuntary confession in *Escobedo* and extended the accused's sixth amendment right-to-counsel privilege to the interrogation process to protect the fifth amendment privilege at that stage of the proceeding.[12] In the 1966 landmark decision of *Miranda v. Arizona*[13] the Court attempted to clarify the ambiguity of *Escobedo* "and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[14] Under the principles laid down in *Miranda*, the suspect must be warned sufficiently of his self-incrimination privilege.[15] In addition to the warnings the accused must have the opportunity throughout the interrogation to exercise his fifth amendment privilege.[16] Moreover, if he states that he wants an attorney, further questioning is not permitted until an attorney is present.[17] Concerning waiver of the privilege, *Miranda* explains that in the absence of counsel the prosecution has the heavy burden of showing that the suspect knowingly and intelligently waived the privilege,[18] and a silent record raises no presumption of waiver.[19] The development of the law since *Miranda* has been aimed at answering at least two questions: "(1) [A]t what stage in the proceeding should the warnings be given; and (2) what type of evidence should be protected by the privilege against self-incrimination."[20] The Supreme Court has not yet faced the issue of whether a minor's request to see his parents constitutes an invocation of his fifth amendment privilege against self-incrimination, although the Court did address a similar issue in *In re Gault*.[21] The California Supreme Court has a line of decisions dealing with the question of what behavior, other than a specific assertion, is necessary to constitute an invocation of the fifth amendment privilege.[22] In *People v. Fioritto*[23] the court held that a refusal to sign a waiver amounted to an invocation of the fifth amendment; in *People v. Ireland*[24] the court held that when the suspect stated, "Call my parents for my attorney," he thereby asserted the privilege; and in *People v. Randall*[25] the court held that a suspect's phone call to his attorney, in and of itself, invoked the privilege.

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[1] CAL. WELF. & INST. CODE §606 (West 1966). All that is needed to confer jurisdiction from juvenile court to criminal court to try a minor over the age of sixteen is proof of the juvenile court's finding of unfitness. People v. Machado, 150 Cal. 2d 190, 309 P.2d 903 (1957).

[2] During the process of booking, appellant's father arrived at the police station. Each requested to see the other, but permission was refused.

[3] 384 U.S. 436, 444-45 (1966).

[4] Appellant made statements on three separate occasions in which he (1) admitted the assault, (2) admitted being present at both murders for which he was charged, but denied doing the shooting, (3) admitted the shooting and explained the circumstances in detail.

[5] 384 U.S. at 442-45.

[6] Appellant was found guilty of assault on the third count, a lesser offense than that charged.

[7] People v. Burton, 2 Crim. 18352 (Cal. Dist. Ct. App. 1971).

[8] U.S. CONST. amend. V.

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[9] Malloy v. Hogan, 378 U.S. 1 (1964).

[10] 378 U.S. 478 (1964).

[11] Note, *Criminal Procedure—Miranda Warnings In Criminal Tax Fraud Cases,* 42 Miss. L. J. 117, 120 (1971).

[12] *Id.* at 120. For an analysis of the development of the constitutional privilege against self-incrimination from the early common law through the Court's ruling in *Escobedo, see* Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 Ohio St. L. J. 449 (1964); Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21 (1965).

[13] 384 U.S. 436 (1966).

[14] Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process,* 38 Miss. L. J. 57, 65 (1966).

[15] The *Miranda* warnings require that a suspect be informed prior to any questioning that he has the right to remain silent, that any statement he makes may be used against him, that he has a right to presence of counsel, and that if he is indigent, the government will appoint counsel for him. 384 U.S. at 442-45, 467-73.

[16] *Id.* at 473-74. The Court said: "If the individual indicates in any manner, at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

[17] *Id.* at 474.

[18] *Id.* at 475.

[19] *Id.* at 475; Carnley v. Cochran, 369 U.S. 506, 516 (1962); People v. Salcido, 246 Cal. App. 2d 450, 54 Cal. Rptr. 820, 823. (Cal. Dist. Ct. App. 1966). Commenting on *Miranda* the court in *Salcido* said:

> We do not believe . . . that the cases hold that the defendant must expressly state that he does not wish to be represented by counsel before a waiver can occur. They simply hold that a silent record is insufficient. They also indicate that the mere silence of the defendant, after he has been advised of his rights, as an isolated fact, is not a waiver. [People v. Salcido, 246 Cal. App. 2d 450, 54 Cal. Rptr. at 823.]

In the instant case the court noted that *Miranda* protects the fifth amendment privilege by obligating police to terminate interrogation if the accused expresses a wish in any manner at any time to remain silent.[26] The court concluded that a minor, when taken into custody and subjected to interrogation without the presence of counsel, may assert the privilege at any time. Relying on *Ireland*,[27] which held that a suspect may indicate such a wish in many ways, and recognizing that *Randall*[28] held that any words or conduct which reasonably appear inconsistent with the suspect's willingness to discuss his case freely with police must be interpreted as an invocation of the privilege, the court further concluded that a minor's request to see his parents must be construed to mean that he is invoking the privilege. Considering whether appellant waived his privilege, the court followed *Randall*, which rejected the voluntary character of any statements resulting from police questioning after the initial assertion of the privilege and held that the admission of this confession constituted reversible error even though it was preceded by a knowing and intelligent waiver.[29]

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[20] Note, *Selective Service Law—Criminal Procedure—Local Board Must Give Miranda Warning Before Requesting Registrant to Produce Evidence Necessary for Prosecution*, 23 VAND. L. REV. 892, 893 (1970).

[21] 387 U.S. 1 (1967). The Court held that the privilege against self-incrimination is applicable in a juvenile hearing and that the juvenile must be advised that he does not have to testify or make a statement. *Id.* at 55. Nevertheless, the Court reserved the question as to whether the admissibility of pre-hearing statements made by juveniles to police officers is governed by the requirements of *Miranda*. The Court said: "[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process. . . ." *Id.* at 13.

[22] People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970); People v. Ireland, 70 Cal. 2d. 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

[23] 68 Cal. 2d 714, 441 P.2d 625, 627, 68 Cal. Rptr. 817 (1968).

[24] 70 Cal. 2d. 522, 450 P.2d 580, 588, 75 Cal. Rptr. 188 (1969).

[25] 1 Cal. 3d 948, 464 P.2d 114, 120, 83 Cal. Rptr. 658 (1970).

[26] Miranda v. Arizona, 384 U.S. at 473-74.

[27] 70 Cal. 2d 522, 450 P.2d 580, 587, 75 Cal. Rptr. 188 (1969).

[28] 1 Cal. 3d 948, 464 P.2d 114, 119, 83 Cal. Rptr. 658 (1970).

The California court has taken a significant step toward broadening the fifth amendment protection against self-incrimination for minors in criminal prosecutions. It has broadened the boundaries of both *Miranda* and *Gault* in determining what constitutes an invocation of the privilege in the context of these particular facts. The court's decision was a logical extension of the recent trend in this area,[30] and it was a warranted step in light of the purposes to be served by this trend. Certainly a minor must have broad protection of the privilege. Because of his physical and psychological immaturity he needs even greater protection than an adult.[31] Few adolescents can resist intense interrogation of adult police officers. The fact that appellant in the instant case called for his parents rather than a lawyer indicates that he was overpowered by the threatening circumstances. In view of the United States Supreme Court's holdings in this line of cases,[32] it seems logical to conclude that if the Court faces this precise issue in the future, it will affirm the position in the instant case. A minor's right against self-incrimination cannot effectively be protected apart from his parent's presence any more than an adult's right can be protected apart from an attorney's presence. It is hoped that the instant decision will become a new national standard in the custodial interrogation of minors facing criminal prosecution and thereby increase the significance of the self-incrimination privilege as a constitutional protection.

William Youngblood

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[29] *Id.*, 464 P.2d at 120, 83 Cal. Rptr. at 664.

[30] People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970).

[31] Comment, *In re Gault and the Privilege Against Self-Incrimination in Juvenile Court,* 51 MARQ. L. REV. 68, 81 (1967). The Supreme Court took this position in Haley v. Ohio, 332 U.S. 596, 599 (1948), and again in Gallegos v. Colorado, 370 U.S. 49, 54 (1962). In *Haley* the Court said:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal. . . . But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom he can lean lest the overpowering presence of the law, as he knows it, crush him. 332 U.S. at 599-600.

[32] *In re* Gault, 387 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

TORT LAW — MUNICIPAL IMMUNITY — REPLACEMENT OF A STOP SIGN IS A GOVERNMENTAL FUNCTION

Appellants, the family of a minor who was killed in an automobile intersectional collision, sought to recover damages from the city of Gulfport for the wrongful death[1] of the minor. The automobile in which the deceased minor was a passenger entered the intersection from the north and was struck by an eastbound automobile which had entered from the west. A stop sign, which had been erected by the city to direct eastbound traffic, was missing.[2] Appellants' accusation of city negligence was countered by the city's contention that it was immune from tort liability for the negligent performance of governmental functions.[3] The trial court sustained the city's motion for a directed verdict[4] on the basis that the function involved was governmental rather than proprietary.[5] On appeal to the Mississippi Supreme Court, *held,* affirmed. When a traffic control device has been completely removed and no ordinance requires the city to maintain one at the intersection, the decision of whether to erect another traffic control device is a governmental function for which the city will be immune from tort liability if it fails to perform. *Wall v. City of Gulfport,* 252 So. 2d 891 (Miss. 1971).

Municipal tort immunity is based upon the theory that a municipality is an agent of the sovereign state. The first exhibition of local government immunity was in England in 1788.[6] The English court provided the county with immunity from liability for damages resulting from the collapse of a defective bridge. The English common law doctrine of sovereign immunity was amended fifty-four years later by an American court decision[7] which divided municipal functions into either proprietary[8] or governmental[9] functions. This "American doctrine" of municipal tort liability[10] has the inherent problem of determining where to draw the line between the two functions.[11] While performing governmental functions a municipality, as an agent of the state, is not liable for its tortious acts.[12] In contrast, almost all American courts had recognized municipal liability for the negligent performance of its proprietary functions by the close of the nineteenth century.[13] Through the years the Mississippi courts have usually construed functions falling in the gray area as being proprietary.[14] One area of municipal activity which most courts considered to be immune from liability was traffic regulation.[15] The operation and maintenance of traffic signals were considered to be within the municipality's police powers[16] and as such were governmental functions. The operation and maintenance of streets, however, were not within the protected area.[17] The planning of location of public improvements[18] and the decision to erect traffic signals at designated locations[19] were considered to be governmental functions. Although some jurisdictions have not strayed from those distinctions,[20] the trend has been to broaden the range of municipal tort liability.[21]

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[1] MISS. CODE ANN. §1453 (Supp. 1971), which allows the family of a deceased minor to bring an action when an action could have been brought by the deceased had he not died.

[2] The sign had been blown away by a hurricane two and one-half months prior to the accident.

[3] Governmental functions may be considered to be those functions which only the government can adequately perform. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 979 (4th ed. 1971).

[4] The trial court indicated that even if the city had a duty to replace the sign, the city was not liable since the absence of the sign was not a proximate cause of the collision. Although the suit had included the driver of the eastbound car as a defendant, the appellants took a voluntary nonsuit as to him in order to appeal the court's dismissal of the suit as to the city. Wall v. City of Gulfport, 252 So. 2d 891, 892-3 (Miss. 1971).

[5] Proprietary functions may be considered to be those functions which a private corporation could just as easily perform. W. PROSSER, *supra* note 3, § 131, at 980.

[6] Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

[7] Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

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[8] Bathke v. Traverse City, 308 Mich. 1, 13 N.W.2d 184, 187 (1944), wherein the operation of an airport by the city was considered held to be a proprietary function; Brummett v. City of Jackson, 211 Miss. 116, 120, 51 So. 2d 52, 53 (1951), wherein the operation of an an airport by the city was held to be a proprietary function; Nestman v. South Davis County Water Imp. Dist., 16 Utah 2d 198, 398 P.2d 203, 205 (1965), wherein the supplying of water for a fee was held to be a proprietary function.

[9] Powell v. Village of Fenton, 240 Mich. 94, 214 N.W. 968, 969 (1927), wherein the fighting of fires was held to be a governmental function; Moore v. Greesboro, 191 N.C. 592, 132 S.E. 565 (1926), wherein the operation of a sewerage system was held to be a governmental function.

[10] Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations,* 16 ORE. L. REV. 250, 269 (1937).

[11] City of Hattiesburg v. Geigor, 118 Miss. 676, 79 So. 846 (1918).

[12] Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations,* 23 MICH. L. REV. 325, 333 (1925).

[13] Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955,* 1966 U. ILL. L. F. 795, 815.

[14] Vinsel, *Liabilities of Municipal Corporations in Mississippi,* 3 MISS. L. J. 298, 317 (1931).

[15] Sandmann v. Sheehan, 279 Ky. 614, 131 S.W.2d 484, 487 (1939); Hammell v. City of Albuquerque, 63 N.M. 374, 320 P.2d 384, 386 (1958), wherein a city was held to be immune from liability for damages resulting from its failure to replace a stop sign; *cf.* Kamnitzer v. City of New York, 265 App. Div. 636, 40 N.Y.S.2d 139, 142 (1943). *Contra,* Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969), wherein a city was held liable for damages resulting from a defective stop light.

[16] Hammell v. City of Albuquerque, 63 N.M. 374, 320 P.2d 384, 386 (1958).

[17] Kirk v. City of Muskogee, 183 Ok. 536, 83 P.2d 594, 596 (1938).

[18] Johnston v. City of East Moline, 405 Ill. 460, 91 N.E.2d 401, 404 (1950).

[19] Raven v. Coates, 125 So. 2d 770, 771 (Fla. Dist. Ct. App. 1961).

To broaden the dimension of liability and to curb the harshness of the immunity doctrine, other tests have been added to determine municipal liability,[22] but nevertheless, the governmental-proprietary distinction still exists.[23] The major test added was simply another choice of labels test; the court would determine whether the function was discretionary or ministerial.[24] A discretionary function is normally the act of making a decision and is generally classified as a governmental function.[25] A ministerial function is the physical fulfillment of a decision made through a discretionary function. It is usually classified as a proprietary function[26] and is without immunity from liability. In contrast, discretionary functions have been given immunity when negligently exercised[27] and, in most instances, even when there has been a failure to exercise the function.[28] The courts' utilization of this test has resulted in a realignment of municipal activities in relation to immunity. The maintenance of traffic regulatory devices has shifted from its former position of immunity, as a police power,[29] to a position labelled as a ministerial function[30] with the resulting liability. Discretionary functions are not, however, totally immune from liability. If its performance or nonperformance violates an ordinance, liability may follow.[31] Many courts have brought discretionary functions within the realm of liability by the use of statutes capable of broad interpretation.[32] In 1957 Florida initiated what appears to be the approaching end to municipal tort immunity by rejecting the doctrine completely.[33] Several states have followed by discarding their own municipal tort immunities,[34] but the majority of states continue to apply the municipal tort immunity doctrine.[35]

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[20] Voigt v. City of Corpus Christi, 419 S.W.2d 445, 447 (Tex. 1967), wherein a city was not held liable for damages resulting from a defective stop light.

[21] Vinsel, *supra* note 14.

[22] Smith, *Municipal Tort Liability,* 48 MICH. L. REV. 41, 45 (1949). Municipal liability would arise if the city's conduct was a nuisance, or if the damage resulted from a "ministerial" act, or if negligent maintenance of property by the city caused the damage.

[23] Antieau, *The Tort Liability of American Municipalities,* 40 KY. L. J. 131, 133 (1952).

[24] *See* Jones v. Sioux City, 185 Iowa 1178, 170 N.W. 445, 449 (1919).

[25] Borchard, *Government Liability in Tort,* 34 YALE L. J. 129, 133 (1924).

[26] *Id.*

[27] Avey v. City of West Palm Beach, 152 Fla. 717, 12 So. 2d 881, 882 (1943). A city's decision not to repair a defective stop light caused an accident, but the court ruled the city to be immune from liability.

[28] Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey,* 9 LAW & CONTEMPORARY PROBLEMS 181, 190 (1942).

[29] Antieau, *supra* note 23.

[30] Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969).

[31] Buckley v. City of Chicago, 3 Ill. App. 2d 39, 120 N.E.2d 375, 376 (Ill. App. Ct. 1954).

[32] Phillips v. Town of Fort Oglethorpe, 118 Ga. App. 62, 162 S.E.2d 771, 772 (1968), wherein a city failed to repair a stop light and the court ruled that the city had violated a statutory duty to keep the streets in a reasonably safe condition for travel; O'Hare v. City of Detroit, 362 Mich. 19, 106 N.W.2d 538, 541-42 (1960).

Recognizing the current trend in municipal tort law, the Mississippi Supreme Court in the case at bar cited two other court decisions which held municipalities liable for violating ordinances requiring the replacement of stop signs.[36] The present court was unable to discover such a violation upon which it could rely in the record of this case. An earlier decision by this court was distinguished by the present court on the ground that failure to repair a defective traffic light could render a street unsafe for persons using ordinary care and caution for their own safety,[37] while failure to replace a completely removed stop sign would not. The present court concluded that without an ordinance requiring replacement, a city's decision to replace a completely removed stop sign is a governmental function.

Although the present court distinguished this case from *Tucker v. City of Okolona*[38] on the basis of the different factual situations, the recent expansion of municipal tort liability in Mississippi may have been extended further by the case at bar. It may appear that the expansion is a retreat from the governmental-proprietary distinction.[39] A more realistic view is that merely a new line of demarcation has been drawn between the two functions. The present court's projection that violation of a city ordinance would be a justifiable ground for relief has labelled some discretionary functions as proprietary functions. Although the Mississippi Supreme Court has not yet chosen to depart from "that ancient battlefield, the 'governmental-proprietary' dichotomy,"[40] the burden of carrying the costs of public benefits, which has been borne by only a few injured individuals rather than the public at large,[41] appears to have been lightened somewhat. The present court could have easily reached the same result without using the veil of governmental-proprietary distinctions. Had it cast aside that out-dated doctrine, the present court could have better related its rule of law to the reality of the facts presented. With the decision in the instant case the court expressed a desire to be consistent. Furthermore, the court feels that the proper body to abolish the municipal tort immunity doctrine is the legislature.[42] These, however, are insufficient justifications for not expanding liability to those who should pay in all such cases — the municipality. "Judicial consistency under the doctrine of *stare decisis* loses its virtue when it conflicts with common sense and present social needs."[43] Those who demand judicial abolition of municipal tort immunity[44] may have to settle merely for modification of the doctrine, but their argument for the judiciary to take the initiative seems a proper one.

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[33] Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

[34] Note, *Municipal Corporations—The Governmental—Proprietary Distinction and Municipal Tort Immunity Begin to Fall in Mississippi,* 41 Miss. L.J. 471, 481 (1970).

[35] Note, *Municipal Liability in Proprietary and Governmental Functions,* 7 J. Pub. L. 503, 506 (1958).

[36] Buckley v. City of Chicago, 3 Ill. App. 2d 39, 120 N.E.2d 375 (Ill. App. Ct. 1954); Grantham v. City of Topeka, 196 Kan. 393, 411 P.2d 634 (1966).

[37] Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969).

[38] *Id.*

[39] *See, e.g.,* Note, *Municipal Corporations—The Governmental—Proprietary Distinction and Municipal Tort Immunity Begin to Fall in Mississippi, supra* note 34, at 471-73.

[40] Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi,* 41 Miss. L.J. 289, 300 (1970).

[41] Smith, *supra* note 22, at 56.

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[42] Anderson v. Vanderslice, 240 Miss. 55, 58, 126 So. 2d 522, 523 (1961) (dictum).

[43] Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169, 173 (1967).

[44] Price & Smith, *Municipal Tort Liability: A Continuing Enigma,* 6 U. FLA. L. REV. 330 & n. 1 (1953).

CRIMINAL PROCEDURE — VAGRANCY ORDINANCE IS VOID FOR VAGUENESS

Petitioners[1] were arrested under various circumstances, and each was subsequently convicted of violating a Jacksonville, Florida, vagrancy ordinance.[2] Petitioners appealed from the Florida municipal court, alleging that the ordinance was void for vagueness. Respondent contended that the ordinance is necessary to deter vagabondage and prevent crimes.[3] The Florida Circuit Court affirmed, the Florida District Court of Appeals denied certiorari. On certiorari to the United States Supreme Court, *held,* reversed.[4] When a vagrancy ordinance fails to give fair notice of what conduct is forbidden and encourages arbitrary arrests and convictions, it is void for vagueness on both counts. *Papachristou v. City of Jacksonville,* 92 S.Ct. 839 (1972).

The reasons for the initial vagrancy laws bear no relevance to modern society. The early laws were enacted because the decaying feudal system and the subsequent Black Death produced alarming labor short-ages.[5] From this birth on English soil the crime of vagrancy crossed the Atlantic early in American history; today it is recognized in all fifty states.[6] The common component of this crime is that the offenders are placed in a certain "status" because of their antisocial conduct.[7] Common examples of such "statuses" are tramps, habitual loafers, gamblers, prostitutes, and beggars.[8] More general categories are unemployed able-bodied persons, persons leading an idle, immoral life without visible means of support, and wanderers.[9] Preventing crime from occurring and arresting persons for suspicion are the primary justifications for such statutes today.[10] Constitutional attacks[11] on the validity of such laws have focused on whether these classifications are too general, lacking of definition, and discriminatory.[12] Many jurisdictions have bent over backwards in finding that their respective vagrancy statutes do not usurp constitutional guaranties.[13] A few courts, while not desiring to declare their law unconstitutional, have held that a particular mode of conduct does not fall into the general classifications under the statute.[14] Undaunted the statutes' foes have relentlessly maintained that the statutes are unduly vague.[15]

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[1] The petitioners were arrested on various charges of vagrancy which included prowling by auto, vagabondage, loitering, being a common thief, disorderly loitering on the street, disorderly conduct — resisting arrest with violence. As an example of the general application of the vagrancy statute, Papachristou and three other defendants were charged with "prowling by auto." The arrest was made because the petitioners had stopped near a used car lot which had been broken into several times. On the night in question, however, there was no evidence of any breaking and entering.

[2] JACKSONVILLE, FLA., ORDINANCE CODE §26-57 provided at the time of the arrests and convictions as follows:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses. [as cited in Papachristou v. City of Jacksonville, 92 S. Ct. 839, 840 at n. 1 (1972)].

[3] Brown v. Jacksonville, 236 So. 2d 141 (Dist. Ct. App. Fla. 1970); Johnson v. State, 202 So. 2d 852 (Fla. 1967). *Johnson* was later reversed by the United States Supreme Court on grounds that the particular conduct did not constitute vagrancy. The Court did not consider the constitutionality of the statute. 391 U.S. 596 (1968); 111 ALR 68; 25 ALR 3d 805 §4.

[4] Under the Florida state court system it is not necessary to appeal to the Florida Supreme Court before seeking certiorari to the United States Supreme Court. The Florida District Court of Appeals is considered a final tribunal for purposes of exhausting state remedies.

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[5] 16 Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960).

[6] Vagrancy is a statutory offense in all states except West Virginia, where it is a common law offense. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557 (1960).

[7] Jenkins v. United States, 146 A.2d 444, 447 (D.C. 1958).

[8] Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203 (1953).

[9] 111 ALR 3rd 68; MISS. CODE ANN. §2666 (1956).

[10] As the courts have applied stricter standards to what constitutes "probable cause," law enforcement officials have utilized vagrancy laws to enable them to arrest persons for vagrancy as a smokescreen for suspicion of more serious crimes. *See* Recent Decisions, 4 AKRON L. REV. 231 (1971); Walsh, *Vagrancy: A Crime of Status,* 2 SUFFOLK U.L. REV. 156, 169 (1968).

[11] Arguments for unconstitutionality are based on the freedom of speech and right to peacefully assemble provisions in the first amendment and the due process clause in the fifth amendment.

[12] Two persons might be engaged in the same activity or conduct, such as loitering, and one without means might be found guilty of loitering and the other with cash on his person might be released. It is the discriminatory application of such statutes which has formed the backbone of the contention that such laws are void for arbitrariness. *See* Walsh, *Vagrancy: A Crime of Status,* 2 SUFFOLK U.L. REV. 156 (1968).

[13] Wallace v. State, 224 Ga. 255, 161 S.E.2d 288 (1968); Ricks v. United States, 228 A.2d 316 (D.C. Ct. App. 1967); Johnson v. State, 202 So. 2d 852 (Fla. 1967); Adamson v. Hoblitzell, 279 S.W.2d 759 (Ky. 1955); Portland v. Goodwin, 187 Or. 409, 210 P.2d 577 (1949); Phillips v. Municipal Court of Los Angeles, 24 Cal. App. 2d 453, 75 P.2d 548 (1938); Morgan v. Commonwealth, 168 Va. 731, 191 S.E. 791 (1937); New Orleans v. Postek, 180 La. 1048, 158 So. 553 (1934).

[14] Note, *Vagrancy: A Constitutional Battle,* 16 SYRACUSE L. REV. 646, 655 (1964-65).

[15] "Though the very concept of crimes of condition involves uncertainty about when the condition attaches and when it ceases to exist, those attacks for vagueness which have been successful have hit at particular statutory language and not at the entire concept of crimes of condition." Lacey, *supra* note 8, at 1221.

In the instant case the Court held that persons are entitled to know what the state of the law is and what conduct is to be avoided. The opinion pointed out that because of vagueness the average citizen probably would not be able to discern when he was committing an offense. The wording of the ordinance evidences "the absence of 'ascertainable standards of guilt.' "[16] The Court also found vagueness in the act as a result of the unshackled discretion it placed in the hands of the police to arrest for mere suspicion, which is a lesser standard than "probable cause."[17] The Court was concerned that "[a] vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[18] Therefore the unanimous opinion concluded that the ordinance was void for vagueness since it fails to give fair notice of forbidden conduct and because it encourages arbitrary arrests.

The present case indicates a continuing awareness of the Court for protection of due process concepts and freedom of movement. Perhaps equally important is the Court's concern for the right of an individual to "follow the beat of a different drum," even if the path leads to a life of non-conformity and idleness. While the prevention of crime is certainly a valid state interest, the corollation between crime and idleness was not sufficiently proven in *Papachristou v. City of Jacksonville.* Even if such a corollation were established, due process dictates that a person be aware of conduct which is deemed criminal in nature. Hopefully, *Papachristou* will provide the impetus for state and city law-making bodies to review similar statutes and ordinances and bring them into line with this decision. If such legislative bodies are reluctant to act, hopefully state courts will read *Papachristou* as the death toll for similar broad vagrancy statutes and ordinances and take the initiative in declaring the laws unconstitutional. The hue and cry from police officials which has accompanied previous inroads into questionable police tactics will probably not be as spirited with this ruling because of the blatent unconstitutionality of the law. Nevertheless, recognizing that crime prevention is equally as important as crime solution, law enforcement agencies will and should seek other techniques for ferreting out potential criminals. *Papachristou* emphasizes, however, that future methods must not cast such a wide net as to snag innocent bystanders in the process.[19] Legislative draftsmen should keep in mind that crime preventive techniques must conform to general "probable cause" requirements since the courts do not presently recognize a separate criteria for "suspicious persons."

Niles McNeel

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[16] 92 S. Ct. 839, 845 (1972).

[17] *Supra* note 10.

[18] 92 S. Ct. 839, 847 (1972).

[19] *Id.* at 845; Williams v. State, 130 Miss. 827, 844, 94 So. 882, 884 (1922) (dissenting opinion).

ATTORNEY AND CLIENT — COMPENSATION — CONTINGENT FEE CONTRACTS VOID IN MATRIMONIAL CASES

Seeking alternatively damages or to set aside a deed executed pursuant to a contingent fee contract conditioned upon obtaining a divorce,[1] a client sued her former attorney in chancery court, alleging violation of trust and undue influence. Defendant attorney had previously represented complainant in a divorce proceeding, and they had entered into the contingent fee contract which gave rise to the instant litigation.[2] The Chancery Court of Panola County dismissed the bill upon the ground that the complainant had failed to meet the burden of proof to sustain the allegations. On appeal the Mississippi Supreme Court, *held,* reversed. A contingent fee contract in a matrimonial action is void as violative of public policy.[3] *Avant v. Whitten,* 253 So. 2d 394 (Miss. 1971).

It is established by the great weight of authority in this country that contingent fee arrangements in divorce cases are unenforceable.[4] The rule applies both when the compensation for an attorney's service is contingent upon the securing of a divorce[5] and when the amount to be paid for an attorney's service is proportioned to the amount of alimony received.[6] Although courts have consistently reached this conclusion, various jurisdictions have advanced different reasons for the same result. Most often courts couch their objections to contingent fee divorce contracts in terms of public policy,[7] suggesting that the personal interest of the attorney in procuring the divorce contradicts the public interest in effecting a reconciliation.[8] Generally the law does not favor divorce,[9] and the proper maintenance of the marriage relation is a matter of public concern.[10] A contract to procure a divorce contravenes public policy and is void.[11] A contingent fee contract for procurement of divorce, giving the attorney a personal interest[12] in preventing a reconciliation between the parties,[13] is at odds with the good order of society and thus unenforceable. [14] There is considerable justification beyond public policy reasons for refusing to enforce a contract to procure a divorce when the fee is contingent upon the amount of alimony ultimately awarded.[15] Alimony is a purely personal right, not a property right, and as such is not prospectively assignable.[16] Moreover, alimony is awarded to provide for the maintenance and support of the wife.[17] It is a fraud upon the court and the husband to seek alimony supposedly based on the necessities of the wife when in truth she has bartered away in ad-

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[1] The contract involved provided: "33 acres of land located in Panola County, Mississippi, Attorney Fee — Fifty percent (50%) of anything recovered either personal property or land — This is action for divorce and to recover one-half ½ of 33 acres of land."

[2] Complainant had previously attempted and failed to obtain a divorce prior to employing defendant. After complainant's execution of the contingent fee contract, defendant filed a bill for divorce on grounds of "constructive desertion." Subsequently, complainant and her husband divided the land by exchanging quitclaim deeds. Thereafter, complainant's bill was voluntarily dismissed, and an uncontested divorce was ultimately granted to the husband on his cross-bill.

[3] Since the land itself was conveyed to innocent purchasers and thus beyond reach, the court allowed the complainant-appellant to recover the value of the land conveyed, less an appropriate attorney fee determined on a quantum meruit basis. The claim for punitive damages, not allowable in a court of equity, was dismissed.

[4] *See* 7 AM. JUR. 2d *Attorneys at Law* §§ 166, 217 (1963); 17 C.J.S. *Contracts* § 235 (1963); Annot., 30 A.L.R. 189 (1924).

[5] *In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923).

[6] McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); 24 AM. JUR. 2d *Divorce and Separation* § 532 (1966).

[7] "The rationale of the blanket voidance rule is similar to that which prohibits a trustee from selling trust property to himself, regardless of the lack of fraud or the fairness of the price, unless all beneficiaries consent. The fear is that the contingent

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fee or the opportunity to make a profit by the sale will tempt the lawyer or the trustee to behave in his own interest, but contrary to the interest of those whom he has a duty to serve. In both cases the object is to prevent publicly-condemned behavior by the party enjoying any benefit from the act which has within it the seeds of that behavior." Note, *Attorney and Client — Contingent Fee Contract in Divorce,* 113 U. PA. L. REV. 278 at n. 18 (1964).

[8] *See, e.g.,* the early case of Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886), which spells out the public policy considerations thusly: "Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed; that families shall not be broken up for inadequate causes, or from unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demands a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which would otherwise pass unnoticed." *Id.,* 28 N.W. at 830.

[9] Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947).

[10] Westerman v. Jordan, 62 Mich. 170, 28 N.W. 826 (1886).

[11] *In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923).

[12] Coleman v. Sisson, 71 Mont. 435, 230 P. 582 (1924), describes the attorney's interest: "Contracts like the one before us, when the attorney is to receive a portion of the money or property obtained from the husband, necessarily tend toward the alienation of husband and wife. The attorney is interested, not in reconciliation, but in alienation. His cupidity serves to direct his action." *Id.* at 444, 230 P. at 585.

[13] For allegations vividly demonstrating the conflict of interest between an attorney employed on a contingent basis and a client seeking a reconciliation, *see* Singleton v. Foreman, 435 F.2d 962, 967 (M.D. Fla. 1970).

[14] Newman v. Freitas, 129 Cal. 283, 61 P. 907 (1900).

[15] *See* 24 AM. JUR. 2d *Divorce and Separation* § 532 (1966).

[16] Blaine v. Blaine, 96 N.J. Super. 460, 233 A.2d 212, 213 (1967); 24 AM. JUR. 2d *Divorce and Separation* § 531 (1966).

[17] *In re* Fisher, 115 Ill. 2d 139, 153 N.E.2d 832, 840 (1958).

vance a portion of that which she is to receive;[18] such contracts effect a misappropriation of the alimony which is designed solely for the wife's maintenance.[19] Finally, though the main justification for allowing contingent fee contracts generally is to insure representation for impecunious persons,[20] a system which customarily taxes the costs of representation to the husband in divorce cases dispenses with the need for contingent fee arrangements for penniless wives.[21]

The general rule prohibiting enforcement of contingent fee agreements in divorce cases is applied in a variety of situations.[22] Most typical is the case in which the wife contracts with the attorney on a contingent basis for dissolution of her marriage and the attorney later seeks to enforce the agreement.[23] But the prohibition has also been applied to expunge a purported attorney's lien on alimony awarded in a contingent fee divorce case.[24] The same result has been reached when the husband initiates the divorce proceedings and the contingent fee contract is concluded between the wife and her attorney in defending the suit.[25] Such contracts are unenforceable whether executed prior to the institution of the divorce proceeding[26] or during its pendency.[27] Even when a contingent fee contract was executed for the purpose of filing a suit for fraud, but the fraud suit was dismissed and a suit for divorce substituted, the original contingent fee contract is unenforceable.[28] Similarly, when the contract to procure a divorce was consummated by a stranger to the marriage, the rule prohibits enforcement by the attorney.[29] The same result occurs whether the contingent fee is for a percentage of the alimony ultimately awarded,[30] whether payable in installments[31] or lump sum,[32] or for a portion of all property secured in prosecuting all claims in combination with a divorce action.[33] The rule, however, does not bar enforcement of such a contract conditioned on the return of a wife's separate property.[34]

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[18] Lynde v. Lynde, 64 N.J.Eq. 736, 52 A. 694 (1902).

[19] See note 15, *supra.*

[20] Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability,* 47 Iowa L. Rev. 942, 943 (1962).

[21] Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712, 713 (Cal. Ct. App. 1968); Opperud v. Bussey, 172 Okla. 625, 46 P.2d 319, 323 (1935); Newman v. Freitas, 129 Cal. 283, 61 P. 907, 910 (1900).

[22] *See, e.g.,* Note, *Attorney and Client—Fees—Divorce Cases,* 15 Ala. L. Rev. 208, 210 (1962).

[23] *E.g.,* Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962).

[24] Barelli v. Levin, 144 Ind. App. 576, 247 N.E.2d 847 (1969).

[25] McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956).

[26] Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712, 713 (Cal. Ct. App. 1968); *In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1924); Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905).

[27] Coleman v. Sisson, 71 Mont. 435, 230 P. 582 (1924).

[28] Wall v. Linder, 159 Colo. 83, 410 P.2d 186 (1966).

[29] Wagner v. Shelly, 241 Mo. App. 259, 235 S.W.2d 414 (1950).

[30] *See* cases cited note 6, *supra.*

[31] Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938).

[32] *In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1924).

In the instant case, because of the overwhelming weight of authority[35] and particularly in view of the compelling policy considerations,[36] the court predictably held that a contingent fee contract in a matrimonial action violates public policy and is invalid.[37] However, the court did allow the attorney to recover a reasonable fee for the services rendered.[38]

The rule articulated by the Mississippi Supreme Court in *Avant v. Whitten,* following logically from its earlier decision in *Ownby v. Prisock,*[39] is couched in broad language, proscribing enforcement of contingent fee contracts in matrimonial actions.[40] This same language, utilized by the Florida appellate court in *Sobieski v. Maresco,*[41] required clarification three years later in *Salter v. St. Jean.*[42] If a similar situation[43] were to arise, the Mississippi Supreme Court might be called on to modify the rule announced in *Avant* to a proscription of contingent fee contracts in divorce actions.[44] Finally, in light of the well settled judicial antipathy toward contingent fee contracts in divorce cases, it is appropriate to consider the consequences for those attorneys who utilize such fee arrangements in these cases. With notable exceptions,[45] most courts which refuse to enforce a contingent fee contract will nevertheless allow a fee pased on *quantum meruit* in divorce cases.[46] On rare occasions attorneys resorting to contingent fee arrangements have been subjected to disciplinary action.[47] The treatment afforded these agreements by the *Code of Professional Responsibility*[48] should fairly apprise solicitors to conscientiously avoid contingent fee contracts in divorce litigation.

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[33] McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969).

[34] Salter v. St. Jean, 170 So. 2d 94 (Fla. Sup. Ct. 1964).

[35] Avant v. Whitten, 253 So. 2d 394 (Miss. 1971).

[36] In *Avant* the Mississippi court quotes with approval the language of Jordan v. Westerman, 62, Mich. 170, 28 N.W. 826 (1886) and Barrelli v. Levin, 144 Ind. App. 576, 247 N.E.2d 847, 853 (1969), which declared: "It may well be that a majority of the general public is no longer concerned with whether divorces are socially desirable or undesirable, or whether contracts that are designed to facilitate or promote the granting of divorces are valid. We are not yet ready to say, however, that it is no longer the public policy of the State of Indiana to discourage divorces and to condemn contracts which discourage reconciliations and provide incentives to attorneys to obtain divorces."

[37] 253 So. 2d at 396.

[38] *Id.* at 397.

[39] 243 Miss. 203, 138 So. 2d 279 (1962), where the Mississippi court first encountered this problem.

[40] 253 So. 2d at 396.

[41] *See* Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962).

[42] *See* Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 1965), in which the Florida appeals court said: "We approve the distinction made by the chancellor and specifically hold that contingent fee agreements in domestic relations litigation are against public policy and unenforceable as they relate to alimony or support or property settlement in lieu thereof, but that same are enforceable when they relate to the return of a wife's separate property." *Id.* at 95.

[43] In Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971), the husband deserted his wife and departed the state taking extensive joint assets of the marriage. The wife executed a contingent fee agreement with her attorney allowing him a percentage of all the personal property recovered from her husband outside the state. Although the attorney secured a divorce for the wife, the contingent fee agreement applied to property obtained in a separate equitable action for the wife's share of their joint assets, and therefore the contract was enforceable.

T. M. Murphree, Jr.

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[44] *But see* Note, *Attorney and Client—Contingent Fee Contract in Divorce, supra* note 7 at 278, n. 18, which argues for a blanket voidance of contingent fee agreements, even in the case of a property settlement supposedly independent of a divorce action.

[45] McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956), (overruling earlier cases on this point) stated: "Since the illegality of the contingent fee contract rests on the ground that it may govern a lawyer's action in a manner which thwarts public policy, the taint of illegality permeates the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in *quantum meruit.*" *Id.* at 773. A later case, Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971), affirms the Minnesota court's stand on this point.

[46] Avant v. Whitten, 253 So. 2d 394 (Miss. 1971); Hay v. Erwin, 244 Or. 488, 419 P.2d 32 (1966); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279 (1962).

[47] *In re* Fisher, 115 Ill. 2d 139, 153 N.E.2d 832 (1958) (censure); Nebraska State Bar Association v. Dunker, 160 Neb. 779, 71 N.W.2d 502 (1955) (censure); *In re* Smith, 42 Wash. 2d 188, 254 P.2d 464 (1953) (reprimand not administered only because question was one of first impression); *In re* Dangler, 182 N.Y.S. 471, 192 App. Div. 237 (1920) (suspension).

[48] CODE OF PROFESSIONAL RESPONSIBILITY (1970). Canon 2, EC 2-20 states: "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified."

CONSTITUTIONAL LAW — EQUAL PROTECTION — INDIGENT DEFENDANTS HAVE A RIGHT TO TRANSCRIPT WHEN APPEALING A MISDEMEANOR CONVICTION

Appellant was convicted on misdemeanor charges of violating two City of Chicago ordinances and was sentenced to pay a fine. The indigent appellant desired to appeal *in forma pauperis* on the grounds of insufficient evidence and prosecutorial misconduct and petitioned the trial court for a free transcript. His petition was denied because the charges against him were non-felony,[1] although the court did find that he was indigent. The Illinois Supreme Court denied a motion by appellant for an order that he be furnished with a free transcript.[2] On appeal to the United States Supreme Court, *held,* vacated and remanded. The equal protection clause of the fourteenth amendment prohibits a distinction between felony and non-felony cases in providing a trial transcript to an indigent appellant, and when a colorable need for a transcript is shown, the state has the burden of showing that less than a complete transcript will furnish a sufficient record for appellate review. *Mayer v. Chicago,* 92 S.Ct.410 (1971).

The right of appeal did not exist at common law, and although it is an integral part of our judicial system today, this right exists only where it is conferred by statute.[3] Once this right of appeal has been established, the equal protection clause of the fourteenth amendment prohibits any "unreasoned distinctions" between persons or groups of persons on account of their race, color, religion, or poverty.[4] For more than a century the judicial decisions of this country have supported the doctrine that an impecunious person should not be denied equal protection of the laws simply because of his poverty.[5] Poor people have been provided with equal protection of the laws by judicial decisions and statutes which have given them the right to counsel[6] and the means for an effective appeal.[7] The indigent's right to a free transcript of his trial in prosecuting a meritorious appeal is a firmly established principle in this country and is one way in which equal protection has been given to the indigent defendant.[8] This right must be free from any unconstitutional distinctions. The courts have held that distinctions made between felony and misdemeanor cases in deciding whether or not the right to free transcript and counsel exists are unconstitutional.[9] However, in *Griffin v. Illinois*[10] the Supreme Court considered such distinctions between capital and non-capital cases to be reasonable. The right to a free transcript has been limited to provide a partial transcript of only the essential points raised on appeal or some alternative that would present a sufficient record of the trial.[11] The Supreme Court has held that an indigent does not have to be given a complete transcript, but he must be furnished with an adequate record of the essential parts of the trial upon which his appeal is based.[12] If the appellant requests a transcript in good faith, the state has to show that less than a full transcript will adequately present the contentions upon which he has based his appeal.[13]

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[1] At the time of appellant's convictions an Illinois Supreme Court rule provided for a free transcript to indigent defendants convicted of felony charges, but it did not provide it to those convicted of non-felony charges. This rule has since been amended to provide for a free transcript to indigent defendants convicted of an offense punishable by six months imprisonment. ILL. ANN. STAT. ch. 110A, § 607 (b) (Smith-Hurd Supp. 1972).

[2] Other Illinois Supreme Court rules provide that in lieu of a verbatim transcript, appellant can prepare a proposed report of the trial and, after submitting to the other counsel for amendments, present it to the court for certification. A written stipulation concerning the facts of the trial can also be used. ILL. ANN. STAT. ch. 110A, §§ 323 (c), (d) (Smith-Hurd Supp. 1972). The appellant in the instant case did not resort to either alternative.

[3] American Life Ins. Co. v. Powell, 259 Ala. 70, 65 So. 2d 516 (1953); State *ex rel.* Patterson v. Autry, 236 Miss. 316, 321, 110 So. 2d 377, 378 (1959); Note, *The Right of Appeal,* 44 J. URBAN L. 505 (1967); ILL. CONST. art. 6, § 6; *accord,* MISS. CODE ANN. § 1150 (1956).

[4] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

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[5] Douglas v. California, 372 U.S. 353, 357-58 (1963); Smith v. Bennett, 365 U.S. 708, 709 (1961); *cf.* Falkenburgh v. Jones, 5 Ind. 296 (1854). *See also* Gramenos, *The Impact of Constitutional Law on Criminal Appeals,* 57 ILL. BAR J. 178 (1968) (outlining the preparation of an appeal for the indigent defendant); Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant,* 1966 U. ILL. L.F. 584, 666-730 (a thorough discussion of the indigent defendant's rights in Cook County).

[6] Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45, 72-73 (1932); *accord,* Brown v. Mississippi, 297 U.S. 278 (1936); 18 U.S.C. § 3006A (Supp. 1972) (originally enacted as Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552); MISS. CODE ANN. § 2505-01 (Supp. 1971).

[7] Draper v. Washington, 372 U.S. 487, 496 (1963); *see* Tarrants v. State, 219 So. 2d 170 (Miss. 1969); ILL. ANN. STAT. ch. 110A, § 607 (1967), *as amended,* (Smith-Hurd Supp. 1972); MISS. CODE ANN. § 1175 (1956).

[8] *See* Long v. District Court of Iowa, 385 U.S. 192, 194 (1966); Griffin v. Illinois, 351 U.S. 12, 19 (1956); 28 U.S.C.A. § 1915(b) (1966).

[9] *See* Wise, *Right to Counsel for Indigent Defendants in Mississippi,* 40 MISS. L.J. 187, 189 (1969); Husbands v. State, 105 Miss. 513, 62 So. 278 (1913) (permitted an *in forma pauperis* appeal from a conviction of a misdemeanor charge); *cf.* Groppi v. Wisconsin, 400 U.S. 505 (1971) (held that a distinction made between felony and non-felony cases for change of venue purposes is unconstitutional).

[10] 351 U.S. 12 (1956).

[11] Draper v. Washington, 372 U.S. 487, 495-96 (1963); *accord,* Farley v. United States, 354 U.S. 521, 522 (1957).

[12] Hardy v. United States, 375 U.S. 277, 279 (1964); *accord,* Coppedge v. United States, 369 U.S. 438, 446 (1962).

[13] Woods v. Rhay, 54 Wash. 2d 36, 44-45, 338 P.2d 332, 337 (1959) (a procedure was outlined to determine when a free transcript should be provided, and the Supreme

In the instant case the Court held that an indigent appellant must be provided with an effective record of his trial to properly present his contentions on appeal. The Court also held that there could be no "unreasoned distinction" between felony and misdemeanor cases and that a misdemeanant should be afforded appellate review equal to that provided for a felon. Although the state must give an indigent a record of his trial, it does not always have to furnish a complete transcript. The Court said that the state could use other means to present the proceedings of the lower court, but the means used must afford the appellant with an adequate record of the parts of the trial upon which his claims are based. The Court found that when the need for a transcript is shown by the appellant, the state has the burden of proving that an alternative to a complete transcript will be sufficient. The Court decided that the Illinois statute,[14] which provided for transcripts in felony cases only, violated the fourteenth amendment. The City of Chicago contended that the transcript should not be provided because appellant was not subject to confinement, but only a fine. The Court rejected this argument and held that an invidious discrimination still existed. Therefore the Court concluded that appellant had to be given a sufficiently complete record to present his claims and that he did not have to show that the alternatives to a full transcript were inadequate; rather the City of Chicago had the burden of proving that the alternatives would be sufficient.[15]

The Court's decision is a continuation of a trend to provide everyone with equal protection of the laws. Included in this trend is the effort to make the indigent person truly equal under the laws and to make the judicial system easily accessible to him. The cases in recent years have held that the state must furnish a destitute defendant in a trial or appellate court with the means to defend himself equal to those which could be afforded by an affluent person. If this were interpreted literally, the states would have to spend an exorbitant amount of money to insure that the impecunious defendants get equal protection of the laws. Although the Court's opinion manifestly upholds the rights of the poor defendents, it qualifies those rights to a degree. A state is not expected to waste its funds simply because a rich person might choose to do so, but a state must provide the poor defendant with adequate and effective means for his defense at his trial and on appeal. Thus, the Court has provided the states with another guideline to determine what has to be done to satisfy the requirements of the equal protection clause, while it has made obvious its intention to preserve the indigent's rights. Another

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Court, in Draper v. Washington, 372 U.S. 487, 489-90 (1963), quoted this procedure); *see* Gardner v. California, 393 U.S. 367, 370 (1969); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958).

[14] ILL. ANN. STAT. ch. 110A, § 607(b) (Smith-Hurd Supp. 1972).

[15] In a concurring opinion, Chief Justice Burger agreed that transcripts should be provided to the indigent appellants, but he said that lawyers who requested a free transcript for a frivolous appeal merely to delay the cause are guilty of misconduct.

Justice Blackmun, in a separate concurring opinion, asserted that appellant's present earnings should be considered on remand.

point of the decision was the ruling invalidating distinctions made between felony and misdemeanor cases in providing transcript and other means of defense to an indigent defendant. This ruling should aid the various legislatures, as well as the courts, in formulating new laws and rules that will not discriminate between persons and that will give support to a more egalitarian system of justice.[16] The constitutional rights of the indigent defendant must be preserved, but determining exactly what is needed to preserve those rights is a major problem confronting the courts. Although the Supreme Court has set forth certain guidelines to make this determination, it is hoped that a more definite standard will be adopted in the near future which will help in alleviating this problem.

John Henson

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[16] Many states have amended their statutes within the past year to conform with the Supreme Court decisions involving the indigent's rights under the fourteenth amendment. *See, e.g.,* MISS. CODE ANN. § 2505-01 (Supp. 1971).

SUBJECT MATTER JURISDICTION — COUNTERCLAIMS — A COUNTY COURT'S JURISDICTION IS OUSTED WHEN A COUNTERCLAIM EXCEEDS ITS JURISDICTIONAL AMOUNT

The appellee, White, sued the appellant, Horton, on a promissory note with a balance due of $6,244.99 in the County Court of the First District of Hinds County. The appellant counterclaimed on 527 transactions, claiming usury and requesting $84,317.02.[1] A jury returned a verdict for the appellant for $84,000.00, but the appellee was awarded a judgment notwithstanding the verdict.[2] The appellant filed a new claim in the Circuit Court of the First Judicial District of Hinds County. The appellee filed and was granted a plea in bar of res judicata based on the prior judgment n.o.v., and the circuit court dismissed the action. The appellant contended that the judgment n.o.v. was based upon the county court's acknowledgment of its lack of jurisdiction, and therefore res judicata is not applicable. On appeal to the Supreme Court of Mississippi, *held,* reversed and remanded. County courts are without power to entertain a case where the defendant's counterclaim independently alleges, in good faith, an amount which exceeds its $10,000.00 limitation. *Horton v. White,* 254 So. 2d 188 (Miss. 1971).

One of the essential ingredients for a claim of res judicata to be effective is that the court be one of competent jurisdiction.[3] In Mississippi the jurisdiction of a county court does not extend to controversies involving more than $10,000.00.[4] This statute has been interpreted by the Supreme Court of Mississippi as establishing the county court's jurisdiction as general but definitely limited.[5] Since subject matter jurisdiction cannot be waived and may be raised at any stage of the proceedings, a court's decision without such jurisdiction is void.[6] Jurisdictional amount is determined from the initial pleadings[7] and is based upon good faith of the claimant.[8] A counterclaim may be considered part of initial pleadings.[9] Although a counterclaim asserted by a defendant cannot be added to the plaintiff's claim[10] or aggregated with other defendants' claims[11] to oust the limited jurisdiction of a court, each claim will be considered separately.[12] Courts of limited jurisdiction cannot entertain claims which exceed their limitation.[13]

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[1] The appellant was engaged in selling vacuum cleaners to the public. The appellee made loans for operating capital to the appellant charging excessive interest rates. Horton v. White, 254 So. 2d 188, 190 (Miss. 1971).

[2] However, the trial judge did not award either party a judgment. 254 So. 2d at 189.

[3] *Cf.* Stegull v. City of Jackson, 191 So. 2d 134 (Miss. 1966); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955).

[4] MISS. CODE ANN. § 1604 (Supp. 1971) ". . . it shall have jurisdiction concurrent with the circuit and chancery court in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of cost and interest, the sum of TEN THOUSAND dollars ($10,000.00)."

[5] Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58 (1949); Daniels v. Jordan, 161 Miss. 78, 134 So. 903 (1931).

[6] Home Ins. Co. v. Watts, 229 Miss. 735, 93 So. 2d 848 (1957) (the court held that a court on its own motion should determine subject matter jurisdiction); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955); Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

In the instant case the court held that the county court is "one of general but limited jurisdiction."[14] The court also held that a counterclaim must meet the same jurisdictional prerequisites as a declaration. If either of the claims independently exceeds the jurisdictional amount, the county court is without jurisdiction. The court observed that the appellant's counterclaim exceeded $10,000.00 and concluded that the county court was therefore without jurisdiction over the counterclaim. It further held that the county court must dismiss or transfer the case to a proper court.

With this ruling the court furnished guidelines for the county court to follow when faced with this dilemma; the county court must dismiss or transfer the case. This will enable the courts to avoid some of the problems that have beset other jurisdictions. New York holds that once the court has acquired jurisdiction of the plaintiff's claim, it has the power to render judgment on any counterclaim.[15] The rule applied in the instant case is supported by the need for judicial efficiency. The appellant voluntarily counterclaimed where there existed several alternate remedies.[16] The case being tried on its merits, Horton had his day in court. To allow the appellant to begin a new action after a previous adjudication permits the appellant to have his case heard twice. However, to allow a court to usurp subject matter jurisdiction cuts across the grain of well-founded jurisprudence[17] — a price too dear to pay for judicial efficiency. Other jurisdictions have held that when a counterclaim exceeds a court's jurisdictional amount, the court retains jurisdiction up to its jurisdictional amount; and the counterclaim may be utilized as an affirmative[18] or a defensive[19] action. In either situation the obvious question is what happens to the excess? Does the defendant waive it, or must he bring a new action? A forced waiver of the excess is extremely unjust, and if the defendant must bring a new action, the court is taxed with an additional trial. On the other hand, when the plaintiff's claim is limited to a dismissal or transferral, the plaintiff has lost his choice of forum or is burdened with the additional expense of the transfer. Choice of forum, however, was never intended to give the plaintiff anything but a convenient and competent place to have his cause heard. Furthermore, although it is true that a transfer will be an additional expense, it is not as expensive or inconvenient as having two trials for one action. Rendering this decision, the Supreme Court of Mississippi has been effective in streamlining Mississippi jurisprudence by not permitting county courts to act at all when they have only partial jurisdiction. An all-or-none theory of subject matter jurisdiction is the most efficient and effective method for adjudicating claims.

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[7] Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58 (1949); Catchot v. Russell, 160 Miss. 330, 134 So. 140 (1931). In addition, jurisdiction once acquired is not defeated by subsequent events, even though they would have prevented jurisdiction in the first instance.

[8] Horton v. White, 254 So. 2d at 191; Lucerne Packing Co. v. Panama Am. Sur. Co., 140 So. 2d 135 (Fla. Dist. Ct. App. 1962).

[9] *Cf.* Miss. Code Ann. § 1483.5 (1956); Horton v. White, 254 So. 2d at 192. In Dyett v. Harney, 53 Colo. 381, 127 P. 226 (1912), the court held that a counterclaim is subject to the same limitations of jurisdictional amount as an action of the plaintiff.

[10] R. H. Green Wholesale Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

[11] Horton v. White, 254 So. 2d at 192.

[12] *Id.;* Dupre v. Gilland, 156 S.C. 109, 152 S.E. 873 (1930) (attorney fees may be added to jurisdictional amount if it is agreed upon prior to the suit).

[13] Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

[14] Horton v. White, 254 So. 2d at 191.

[15] In Brink's Express Co. v. Burns, 230 App. Div. 559, 245 N.Y.S. 649 (Sup. Ct. 1930) the court held that a county court had complete jurisdiction over the entire counterclaim including that which exceeded its limitations.

[16] The appellant could have refrained from counterclaiming and simply filed a new action, or requested a transfer from the county court prior to the trial, or appealed within the alloted time.

William H. Shaheen

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[17] Home Ins. Co. v. Watts, 229 Miss. 735, 93 So. 2d 848 (1957); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955); Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

[18] Nelson v. Meyer, 66 Colo. 168, 180 P. 86 (1919) held that counterclaims may be considered as defensive measures to the extent the plaintiff's claim can be determined.

[19] Holmes v. Straus, 283 Ill. 621, 119 N.E. 708 (1918); Oglesby Granite Quarries v. Schott Monument Co., 540 Ohio St. 196, 6 N.E.2d 766 (1935). The courts in both states are allowed to use counterclaims as an affirmative action to the court's limitation.

CONSTITUTIONAL LAW — WOMEN'S RIGHTS — STATUTORY PROVISION GIVING MANDATORY PREFERENCE TO MEN OVER WOMEN WHEN APPOINTING ESTATE ADMINISTRATOR VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Mother and father of a deceased son filed separate petitions for administration of decedent's estate. The probate court held a joint hearing on the two petitions and ordered that letters of administration be issued to the father pursuant to an Idaho statute that compelled a preference for males over females of equal entitlement.[1] On appeal to the District Court of the Fourth Judicial District of Idaho, the case was remanded because the challenged code section violated the equal protection clause of the fourteenth amendment.[2] The father appealed this decision to the Idaho Supreme Court, which rejected the mother's contention that the statute violated the equal protection clause and reversed the District Court. On appeal to the United States Supreme Court, *held,* reversed. A statutory provision that gives mandatory preference to men over women, when persons of the same entitlement class apply for appointment as administrator of a decedent's estate, violates the equal protection clause of the fourteenth amendment.[3] *Reed v. Reed,* 91 S.Ct. 251 (1971).

The plight of the American woman was initially thrust into national focus by the 1872 decision in *Bradwell v. The State,*[4] in which the Supreme Court upheld Illinois' refusal to admit women to the practice of law. In *Bradwell* the Court illustrated the male supremacist attitude by declaring that women belong at home.[5] Women's rights were again highlighted in the 1908 case of *Muller v. Oregon,*[6] which suggests that "sex is a valid basis for classification."[7] The *Muller* opinion, which many feel has been interpreted too broadly,[8] stressed the woman's need for employment protection.[9] The women's rights movement gained an added impetus in 1920 when the nineteenth amendment granting suffrage to women was adopted, but feminists were again dealt a devasting blow in 1948 by the Court's opinion in *Goesaert v. Cleary*.[10] *Goesaert* was basically the first litigation in which the argument of "equal protection" was submitted,[11] and the Court dismissed this argument by stating that the discriminatory statute in question was neither unreasonable nor arbitrary.[12] Some state courts have rejected the "reasonableness" test for sex classification that was applied in *Goesaert*[13] and have substituted the more stringent "suspect classification" and "compelling interest" tests.[14]

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[1] IDAHO CODE ANN. § 15-312 (1948) provides in part:

> *Priorities in right of administration.*—Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: 1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

IDAHO CODE ANN. § 15-314 (1948) further provides:

> *Preferences.*—Of several persons claiming and equally entitled to administer, males must be preferred to females, ...

[2] U.S. CONST. amend. XIV, § 1, provides in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] On March 12, 1971, the Idaho Legislature adopted the *Uniform Probate Code,* effective July 1, 1972. On that date, §§ 15-312 and 15-314 of the former code were effectively repealed.

[4] 83 U.S. (16 Wall.) 130 (1872).

[5] Justice Bradley, in his concurring opinion, states: "The constitution of the family organization, . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Id.* at 141.

[6] 208 U.S. 412 (1908). A statute that limited the hours of employment for women was held to be constitutional.

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[7] *Id.* at 420. This interpretation has evolved from the following words from the Court's opinion:

> [The] widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she be permitted to toil. *Id.* at 420.

[8] One writer insists that much of the court's language was unnecessary. "Unfortunately, the argument's appeal to male chivalry resulted in language unnecessary to the narrow holding of the decision, ..." *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U. L. Rev. 481, 484 (1971). Another writer states: "The *Muller* case involved a state maximum hours law for women, but the case language has been divorced from its context and loosely applied." *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment,* 42 So. Cal. L. Rev. 183, 200, 201 (1969).

[9] Muller v. Oregon, 208 U.S. 412 (1908). The court stated, ". . . the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421.

[10] 335 U.S. 464 (1948). The court upheld a Michigan statute that prohibited a female from working as a bartender unless she was the "wife or daughter of the male owner." *Id.* at 465.

[11] *See* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 877 (1971) [hereinafter cited as Brown].

[12] The "reasonableness" test applied in Goesaert v. Cleary, 335 U.S. 464 (1948) is the traditional equal protection test used to determine whether a statutory classification is valid. Under this view, the statute is valid if it is reasonable and not arbitrary to the legislative objective of the statute. *See* Morey v. Doud, 354 U.S. 457 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[13] *See, e.g.,* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971). Overruling a statute that prohibited females from working as bartenders, the California Supreme Court blasted the "reasonableness" test used by the Supreme Court and adopted the more stringent "suspect classification" and "compelling interest" tests.

[14] Basically, this means that any classification that is determined to be "suspect" is subject to a much stricter standard of review than under the reasonableness test. For example, under these tests any classification based on sex is strongly suspect, . . . "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state

The Supreme Court and most state courts, however, have consistently applied the reasonableness standard to sex discriminating statutes.[15] After *Goesaert,* one of the most significant influences upon the women's rights movement was the 1964 Civil Rights Act.[16] Not only did this Act cause many states to pass legislation prohibiting sex discrimination,[17] it also provided women with a new basis for litigation.[18] Nevertheless, the most frequent basis for litigation has continued to be the violation of the equal protection clause.[19] Although the Supreme Court has continued to uphold sex discriminatory policies[20], modern state courts and lower federal courts have begun to grant to women new privileges that were formerly denied them.[21]

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policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964); *accord,* Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Kramer v. Union Free School District, 395 U.S. 621 (1969).

[15] *See* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970); Hoyt v. Florida, 368 U.S. 57 (1961); LaFleur v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio 1971); Eslinger v. Thomas, 324 F. Supp. 1329 (D.S.C. 1971); State v. Hall, 187 So. 2d 861 (Miss. 1966).

[16] Title VII of the 1964 Federal Civil Rights Act generally prohibits employment discrimination because of an individual's sex. 42 U.S.C. § 2000e-2(a) (1970). Nevertheless, the Act does permit sex classification when sex is found to be a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1970).

[17] In a suit based on the Act, the party would claim that the state law violated the Act, and the supremacy clause required that the state law yield to federal law. *See* Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968) (statute that denied a woman a certain job was found to conflict with title VII of the Act, and the state law was forced to yield to the federal law). *See generally* Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968).

[19] *See* cases cited note 15 *supra.*

[20] *See* Hoyt v. Florida, 368 U.S. 57 (1961) (statute excluding women from jury service unless they volunteered was upheld). *Contra,* Reed v. Reed, 92 S.Ct. 251 (1971).

[21] *Compare* Patterson Tavern & Grill Owners Assn. Inc. v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970) (bartending upheld); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (longer prison sentences for women than men when same crime is committed held invalid); Karcqewski v. Baltimore & O. R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (loss of consortium allowed); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (statute barring women from jury duty held invalid); Kirstein v. Rector & Visitors of the Univ. of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) (state university must admit women); Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va. 1971) (policy requiring a leave of absence after five months pregnancy held invalid), *with* Goesaert v. Cleary, 335 U.S. 464 (1948) (bartending disallowed); *Ex parte* Gosselin, 141 Me. 412, 44 A.2d 882 (1945) (statute imposing longer maximum sentence on women than on men upheld); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968) (loss of consortium denied); State v. Hall, 187 So. 2d 861 (Miss. 1966) (exclusion of women from jury upheld); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958) (admission into all-male school denied); LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971) (policy requiring leave of absence after four months pregnancy upheld).

In the instant case the Court recognized that the fourteenth amendment does not deny states the power to treat different classes of persons in different ways.[22] The court noted, however, that the classification must be reasonable, not arbitrary, and substantially related to the legislative objective.[23] The Court determined that the objective of the discriminating Idaho statute was to reduce "the workload on probate courts by eliminating one class of contests." Nevertheless, the Court unanimously concluded that, although the statutory objective was "not without some legitimacy," giving mandatory preference to one sex over the other simply to eliminate hearings on the merits was the type of arbitrary legislation forbidden by the equal protection clause of the fourteenth amendment.[24]

The Court's decision represents a beneficial contribution to the female campaign for equality, and its immediate effects are apparent. The decision will certainly require noteworthy changes in those states whose probate statutes are similar to those in Idaho. It may also cause state officials to re-examine other statutory provisions that classify persons according to their sex. The total significance of the Court's decision, however, is questionable. Undeniably sex-based distinctions are becoming socially and politically unacceptable. As a result the value of the fourteenth amendment as a means of preventing discrimination is being challenged.[25] While some proponents of the feminist movement argue for a change in the Court's standards for testing sex classifications,[26]

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[22] In the opinion, the Court relied on the following cases: Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1968).

[23] When explaining the reasonableness test, the Court cited Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[24] 92 S. Ct. at 254.

[25] As one opinion states:

> On this state of affairs one cannot say that the possibility of achieving substantial equality of rights for women under the Fourteenth and Fifth Amendments is permanently foreclosed. But the present trend of judicial decisions, backed by a century of consistent dismissal of women's claims for equal rights, indicates that any present hope for large-scale change can hardly be deemed realistic. Brown, *supra* note 11, at 882.

[26] The Supreme Court's continued reluctance to adopt the strict standard of review for sex-discriminating cases is very perplexing. As indicated in note 14, *supra,* if a court determines a particular area to be "suspect," then any discriminating statute in that area would be invalid unless it were justified by a "compelling state interest." In view of the fact that areas such as "race" and "wealth" have been deemed suspect (*see, e.g.,* McLaughlin v. Florida, 379 U.S. 184 (1964) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), it seems logical that sex would also be considered a suspect area. However, no indication of such a change is evident in *Reed.* One reason for this might be that the statute was easily considered invalid under the traditional reasonableness test, and the more strict standard was simply not needed. Thus, the Court might be waiting for a more timely introduction of the strict standard of review.

As far as this writer is concerned, it seems likely that sex will become a "suspect" area in the near future. As stated in note 27, *infra,* an equal rights amendment has others insist that only a constitutional amendment will grant them relief.[27] Unfortunately, the general notions of male supremacy prevail today,[28] despite the fact that women comprise thirty-seven percent of the United States work force.[29] Thus, additional legislation and litigation will be necessary before women can hope for complete co-extension of rights. While it is unlikely that the Court's decision standing alone will accomplish these objectives, hopefully it does indicate that future successful challenges are forthcoming.

David Wilder

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been passed by Congress. If this amendment is ratified by the states, certainly enough emphasis will be placed on sex to designate it a suspect area. At any rate, the continued attack on the present Court standard (*see Are Sex-Based Classifications Constitutionally Suspect?, supra* note 8 at 492) and the adoption of some states of the strict standard [*see, e.g.,* Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 5 Cal. 3d 1, 485 P.2d 529 (1971)] indicate the general feelings on the subject.

[27] An equal rights amendment for women has been proposed in every Congress since 1923. *See* Brown, note 11 *supra,* at 886. The currently proposed amendment reads in part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. RES. No. 208, 92d Cong., 1st Sess. (1971). Interestingly enough, the 1972 Congress has passed such an amendment and all that remains before the amendment is adopted is ratification by two-thirds of the states. As eight states have already ratified the bill, it seems likely that the amendment will become a reality. One source, who is quite enthusiastic about the value of such an amendment, states:

> [T]he Amendment will establish fully, emphatically, and unambiguously the proposition that before the law women and men are to be treated without difference. Brown, *supra* note 11, at 980.

Contra, Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law,* 48 NEB. L. REV. 131 (1968). In his article the author gives the impression that the amendment would not result in any major changes for women.

> [I]t is submitted that were the amendment adopted, it would have little or no effect upon existing Constitutional doctrine in the area of sex discrimination. Then, as now, the crucial factor will continue to be the responsiveness of the judiciary to the social impulse toward equality of treatment without regard to sex. [*Id.* at 181].

[28] Even the 100 year lapse since *Bradwell* has not produced a significant increase in the number of women lawyers. In a survey in which six major cities were included, it was determined that there was a total of 40 major law firms with 2,708 lawyers. Out of these 2,708 lawyers, only 186 were women. Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act,* 56 WOMEN LAW. J. 28, 33 (1970). For other examples of male supremacy, *see* Boyer, *Equal Opportunity for Women—In Our Time,* 56 WOMEN LAW. J. 5, 7-10 (1970).

[29] *See* U.S. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 28, 29 (1971).

CRIMINAL PROCEDURE — SEARCH AND SEIZURE — WARRANTLESS SEARCH OF ARRESTEES' BRIEFCASES OUTSIDE THE AREA WITHIN THEIR IMMEDIATE CONTROL IS UNLAWFUL

The petitioners were convicted in federal district court for possession of unregistered firearms in violation of federal law.[1] Entertaining certain suspicions, police officers questioned, frisked, and arrested petitioners for not carrying draft cards.[2] Upon the approach of the officers, the petitioners placed their briefcases on the sidewalk and after the initial questioning walked away from them. The police pursued the petitioners a short distance and made the arrest. Following the arrest and placement of the petitioners in the police car, the officers retrieved the briefcases. A warrantless search revealed a sawed off shot gun in each briefcase. Contending that this warrantless search and seizure was conducted outside the area within their immediate control and thus violated their rights under the fourth amendment, petitioners moved to have the evidence procured from the search suppressed. The district court denied the motion to suppress, upholding respondent's contention that the search and seizure fell within the exception of the immediate control rule. On direct appeal to the Fifth Circuit Court of Appeals, *held* reversed. When arrestees are secured in a police car, a warrantless search of their briefcases outside the car and beyond the arrestee's immediate control is violative of the fourth amendment. *United States v. Colbert,* 454 F.2d 801 (5th Cir. 1972).

The incorporation of the fourth amendment into the Constitution was a reaction to the despotic practices of the English King, allowing unwarranted intrusions upon property and persons.[3] The past sixty years have produced a prolificacy of judicial pronouncements aimed at establishing workable as well as constitutional guidelines for both the warranted and warrantless search and seizure. In its first significant opinion the United States Supreme Court indicated that a warrantless search of the person for "fruits of the crime" when incident to a valid arrest is not violative of the Fourth Amendment.[4] From there it was only a matter of time before the permissible scope of the warrantless search was expanded to include the area within the arrestee's control.[5] It was again expanded to include the place of arrest[6] and all areas of the premises used for illegal purpose.[7] Search of areas other than the arrestee's person was limited by whether a crime was being committed in the presence of the arresting officers.[8] Reversing direction again, the Supreme Court rendered two decisions expanding the scope of the warrantless search to areas not only within the arrestee's physical possession, but to those areas within his "constructive possession" as well.[9] In between these two significant decisions emerged another holding by the Court wherein the determinative factor was one of reasonableness. The Court found that when it was practical to first obtain a search warrant, failure to do so would render the search an unreasonable one.[10] Much time was to pass before the Court returned to this standard. During the 1950's, decisions continued to expand the scope of the warrantless search to areas more remote in time and place from the incidental arrest.[11] Concluding that the scope of the warrantless search incident to arrest had traveled too great a distance, the Court found a resting place in 1969 in *Chimel v. California*.[12] The Court held that a warrantless search incidental to an arrest is valid only in areas within the "immediate control" of the arrestee.[13]

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[1] 26 U.S.C. § 5861 (d) (1964) providing: "It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

[2] 50 U.S.C. App. § 462 (1964).

[3] U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Compare MISS. CONST. art. 3, § 23:

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

In the instant case the Fifth Circuit Court of Appeals found that *Chimel* supplied the "authoritative statement concerning the constitutionally permissible scope of a warrantless search incident to a lawful arrest."[14] The court reiterated the *Chimel* limitation that the searched area must be within the "immediate control" of the arrestee and repeated that the area of "immediate control" is that area from within which the arrestee might reach to grab a weapon or destructible evidence.[15] Stating that it did not decide whether the briefcases might have been legally searched at any other time during the frisking or arrest procedure, the court relied on *Preston v. United States*[16] to invalidate the search which occurred after the arrestees were sitting in the patrol car some "few" feet from the briefcases.[17] Moreover, the court rejected the respondent's argument that *Carroll v. United States*[18] created an exception validating the warrantless search in the instant case.[19] Rather the Circuit Court relied on *Coolidge v. New Hampshire*[20] to emphasize the necessity for obtaining a search warrant unless exigent circumstances make it impractical.[21] Dissenting, Judge Dyer "strenuously" concluded that since "one short lunge" by either of the arrestees would have brought the briefcases within their control, the necessary exigent circumstance as allowed by *Chimel* and *Coolidge* was present.[22]

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[4] Weeks v. United States, 232 U.S. 383 (1914).

[5] Carroll v. United States, 267 U.S. 132 (1925).

[6] Agnello v. United States, 269 U.S. 20 (1925).

[7] Marron v. United States, 275 U.S. 192 (1927).

[8] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932).

[9] United States v. Harris, 331 U.S. 145 (1947); United States v. Rabinowitz, 399 U.S. 56 (1950). Upholding a warrantless search of four rooms lasting five hours, incidental to a search with a warrant, the Court in the *Harris* decision ignored the element of practicality in obtaining search warrant and construed those areas within the arrestee's control to include those areas of constructive possession. The Court stated that a thorough search was necessary because the object of the search was small in size. Following those standards of constructive possession promulgated by *Harris*, the *Rabinowitz* decision expressly overruled Trupiano v. United States, 344, U.S. 699 (1948). The court held that where the police officers obtained an arrest warrant but not a search warrant, the necesssity of procuring the search warrant was dependent not on the practicality of obtaining it, but rather upon the reasonableness of the search after the arrest.

[10] Trupiano v. United States, 344 U.S. 699 (1948).

[11] *E.g.*, Clifton v. United States, 224 F.2d 329 (4th Cir. 1955).

[12] Chimel v. California, 395 U.S. 752 (1969). *Chimel* rejected the theories of *Harris* and *Rabinowitz* and returned to the standards of *Go-Bart, Lefkowitz,* and *Trupiano.*

[13] 395 U.S. at 768.

In the instant case the court was properly cognizant of the standards required by *Chimel.* Courts have been vitally concerned with the protection of individual liberty as guaranteed by the fourth amendment; any evidence which is found and seized in violation of that right must not be allowed to form any basis of a criminal conviction. The instant case most poignantly presents one of the problems in applying the *Chimel* standards — how to determine the exact area which may be deemed within the "immediate control" of the arrestee. The dissent, founded on this point, is bolstered by a 1969 decision upholding a search of an automobile within leaping distance of the arrestee.[23] A statement in the dissent (although not a theory pursued by that circuit judge) suggests another vital element of the arrest and search process — the disclaimer of ownership of the briefcases by the arrestees.[24] There is an abundance of decisions upholding warrantless searches and seizures when the arrestees either abandoned or disclaimed ownership or interest. Several decisions have announced various circumstances in which property will not be deemed abandoned.[25] It seems that the instant case in no way falls within the purview of these decisions, but rather conforms to the findings of others with strikingly similar factual situations.[26] Courts which have upheld such warrantless searches of abandoned property incident to arrest generally conclude that in fact no actual search or seizure within the "legal meaning" of the term has occurred.[27] When there is available to a court a theory upon which to uphold a police procedure in protection of the public welfare, it seems that the rendering court should give the theory due consideration while also giving due consideration to individual liberties.

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[14] United States v. Colbert, 454 F.2d 801, 803 (5th Cir. 1972).

[15] *Id.*

[16] 376 U.S. 364 (1964). *Preston* held that the search of an automobile, once it was in police custody and the arrestee in jail, was invalid because the mobility of the automobile was effectively restricted.

[17] 454 F.2d at 804.

[18] 267 U.S. 132 (1925).

[19] 454 F.2d at 804.

[20] 403 U.S. 443 (1971) (warrantless search of an automobile parked in the arrestee's driveway held invalid since there was no danger of its removal).

[21] 454 F.2d at 804.

[22] *Id.* at 805.

[23] Application of Kiser, 419 F.2d 1134 (8th Cir. 1969).

[24] 454 F.2d at 805.

Ann Wynne Ball

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[25] United States v. Fay, 239 F. Supp. 132, 135 (S.D.N.Y. 1965) (an object was not abandoned when the arrestee dropped it after the arresting officer made a move toward his gun); Ingram v. State, 45 Ala. App. 108, 226 So. 2d 169 (1969) (where an officer was unlawfully within a private yard, no object he found there would be deemed abandoned); Moss v. Cox, 311 F. Supp. 1245 (E.D. Va. 1970) (a marijuana cigarette dropped by the arrestee was inadmissible since it was dropped during the officer's search).

[26] Hayes v. State, 44 Ala. App. 539, 215 So. 2d 604 (1968) (articles dropped to the ground after the police had told the suspect to halt were abandoned and lawfully subject to examination by the officers); Oliver v. State, 449 P.2d 252 (Sup. Ct. Nev. 1969) (a white object thrown to the ground after the defendant was arrested by warrant for traffic violations, was admissible as abandoned property in a conviction for possession of marijuana).

[27] Burton v. United States, 272 F.2d 473 (9th Cir. 1959). In holding heroin dropped from beneath a coat admissible, the court stated:

> [W]e find no evidence of illegal search and seizure, and in fact we find no evidence of any search . . . no seizure . . . within the legal meaning of that term. The heroin was abandoned property. [*Id.* at 467-77].

Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954). In admitting evidence dropped to the street the court stated:

> There was here no seizure in the sense of the law when the officers examined the contents of the napkin after it had been dropped to the street. [*Id.* at 30].

BOOK REVIEWS

The Lawyer, The Public, And Professional Responsiblity

F. Raymond Marks with Kirk Leswing and Barbara A. Fortinsky. Chicago, American Bar Foundation, 1972. Pp. xii + 305. $7.95

This book is the result of an American Bar Foundation study, funded in a large part by a Ford Foundation grant, of response by the private bar to the public interest. Working from a series of interviews with individual attorneys, the authors have compiled a well-organized, logical, and readable book from which to present the thesis that public interest law is really synonymous with the practice of law and that the legal system is to be operated in trust for the good of the public.

From the time that the legal profession first started organizing in the late nineteenth century, the question of professional responsibility to the public has arisen as an important issue. In the twentieth century the bar split into two camps: a public bar, which attempted to insure legal representation for all who needed it, and a private bar, which catered to paying clients. However, a condition was soon reached whereby Big Government was represented by the public lawyer; Big Business was represented by the private lawyer; and The People were notably unrepresented. The social upheaval of the 1960's brought into sharp focus the glaring failure to give all Americans equal access to the legal system. It was this failure to make the Bill of Rights a reality that has prompted the current "public interest" urges and responses which this book analyzes within the legal profession.

The authors first examine the present public interest response of today's bar. Private firms have used several different approaches to meet this responsibility. Some firms have formed a public interest department or named a public interest partner to work within the firm framework. Others have established branch offices in ghettos or allowed partners and associates to be released from the commitments of the firm to engage in non-fee work. Next the groups that serve as brokers for this public interest work are examined. These groups include the Community Law Offices, the Lawyer's Committee on Civil Rights, OEO Legal Services, and the American Civil Liberties Union. Also examined is the new phenomenon called the public interest law firm, which is committed to meet the needs of the public. These firms, such as the Washington Research Project, the Center for Law and Social Policy, and the Native American Rights Fund, are organized to represent a broad range of individual client groups such as consumers, pollution-control groups, and minorities. The main drive behind the public interest firm is to bring about reform for each of the policies or groups which they represent. The final product of this change within the legal profession is the active response of the organized bar to bring the legal system to all our citizens. America's lawyers, it is said, must come to grips with the need for making the public interest the responsibility of all practitioners. It is only in this way, the authors suggest, that there will truly be equal justice for all.

The authors conclude that the legal profession is at a crossroads in its existence. Will the remedying of the social needs which the new responsiveness has sought to redress become an integral part of the professional ethic, or will the imbalance of legal services continue so that the lawyers' sense of duty will still not extend beyond economic self-interest and loyalty to regular clients? The burden of replying to social need is felt to be a responsibility of the profession which must be met as a moral and legal obligation.

In the authors' words, the haunting question for the entire profession remains:

> The public interest responder is raising for himself and for his profession the question whether the law is a profession after all if it will not relate its daily occupation to the very core of the legal imperative: resolution of social conflict and the evolution of fair and just rules for the society.

William C. Trotter III

MYTH AND REALITY IN CONSUMER CREDIT RATE REGULATION

*James L. Robertson**

I. General Introduction

A. The Context

Interest rates and rate limitations have been a subject of widespread concern in Mississippi in recent years. In the tight money times of 1970 there was a considerable controversy over the efficacy of Mississippi's general eight percent usury statute.[1] The advent of Truth-In-Lending,[2] and the increasing awareness of the rates actually being charged by small loan companies,[3] have been a cause for further concern.

The controversy reached the boiling point in 1972. After being subjected to extensive lobbying, both houses of the legislature enacted Senate Bill No. 1535.[4] This bill would have authorized sellers, lenders and issuers of credit cards to impose a maximum finance charge of 1½ percent per month. On May 8, 1972, Governor Waller vetoed Senate Bill No. 1535.[5]

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[1] Senate Bill No. 2209 (1970 Reg. Sess.); House Bill No. 1814 (1970 Reg. Sess.). The latter bill, which would have increased the general usury limitation to ten percent per annum, created considerable controversy. *See also* House Bill No. 272 (1970 Reg. Sess.) which would have restricted credit card rates to eight percent.

[2] 15 U.S.C. §§ 1601-13, 1631-41, 1661-65, 1671-77 (1970), and 18 U.S.C. §§ 891-96 (1970). This federal enactment, which for the most part became effective on July 1, 1969, is properly known as the Federal Consumer Credit Protection Act of 1969. Title 1 of that Act, dealing with the consumer credit cost and rate disclosure, is popularly known as the Truth-In-Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1970).

[3] By law small loan companies are permitted to charge a rate not to exceed "two percent (2%) of the amount of cash received by the borrower multiplied by the number of months for which the loan is extended." Miss. Code Ann. § 5591-09 (b) (Supp. 1971). Truth-In-Lending has disclosed that the true rate on loans made at the ceiling is 41.69 percent annual percentage rate (APR).

[4] A similar bill had failed in 1971. House Bill No. 705 (1971 Reg. Sess.). The impetus for the enactment of a credit card rate bill was greatly increased in 1971 because of the threatened importation of such recent decisions as State v. J. C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970), holding that a 1½ percent per month charge on the declining unpaid balance of a retailer's revolving charge account violated Wisconsin's 12 percent usury limitation. *Contra,* Sliger v. R.H. Macy & Co., 59 N.J. 465, 283 A.2d 904 (1971).

In his veto message, Governor Waller recommended that an "in depth study be made relative to all laws concerning interest rates." He stated his belief that an intensive examination into the area of finance charges and consumer financing can result in a modernization of our laws. The Governor noted that Mississippi's current laws regulating interest and finance charges "are in a state of confusion." He urged that all Mississippians work together "to develop much needed reform in our installment credit laws."[6]

Governor Waller's recommendations are sound. Mississippi's existing rate structure is in great and immediate need of modernization. This can best be accomplished by the sort of intensive study recommended by the Governor. This article has been prepared in the hope that it will assist those officially charged with the making of such a study.[7]

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[5] Veto Message of Governor William L. Waller delivered to the Mississippi State Senate on May 8, 1972. Shortly thereafter, a civil action was filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi, styled *Deposit Guar. Nat'l. Bank v. Ladner,* challenging the legality of the veto. The decision of the circuit court, which undoubtedly will be appealed, was reported in the Jackson Clarion Ledger, July 12, 1972, at 1:

> Hinds County Circuit Judge M. M. McGowan ruled Tuesday [July 11, 1972] that Governor Bill Waller's attempted veto of an 18 percent interest rate on credit card and revolving credit accounts was not returned to the Senate before a veto deadline, and that the measure is now state law.

On July 25, 1972, Justice Robert G. Gillespie denied a Petition for Supersedeas from the trial court's order.

In addition, there are presently pending at least two civil actions, which challenge under the general usuary statute the 1½ percent per month rate regularly charged by BankAmericard and Master Charge, the two leading consumer credit companies doing business in Mississippi. Roper v. Consurve, Inc., No. 4261 (S.D. Miss. 1972), and Mize v. First Nat'l. Bank of Jackson, No. 4359 (S.D. Miss. 1972). Nothing said herein is intended to indicate any opinion concerning any pending litigation, nor is it intended in any way to influence the outcome of such litigation or to suggest what that outcome should be or will be. Further, since the following discussion is based primarily upon economic, not legal, principles, the outcome of these pending lawsuits will in no way affect the validity of the conclusions and recommendations presented herein.

[6] Veto Message, *supra* note 5.

[7] This article is not intended to be the "intensive examination" suggested by Governor Waller. Its purpose is the presentation of the consumer credit problem and a suggested remedy.

B. The Thesis

Rate regulation in Mississippi is in disarray.[8] Our statutory rate ceilings,[9] and the judicially recognized exceptions[10] to them, have produced an irrational and arbitrary segmentation of the consumer credit market which is outdated and archaic. Rate control in Mississippi has replaced prohibition as the leading absurdity in our present law, our usury statute being honored more in breach than in observance.[11]

It appears that the rate structure and the rate regulation policy of the Uniform Consumer Credit Code[12] are the appropriate antidotes. The UCCC treats rates in a modern, sound and economically realistic way.[13] It is a sophisticated, economic statute designed to assure an adequate availability of credit for the consumer. Rate ceilings are set at relatively high levels, with the forces of competition in the market place being substituted for state controls as the primary regulator of rates. This new rate policy would permit creditors to earn a fair profit, while ensuring that the consumer will pay no more for credit than is economically necessary.

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[8] The author has also discussed this subject in Robertson, *The Uniform Consumer Credit Code in Mississippi,* 54 MISS. BANKER 13 (1970), and briefly in Robertson, *Consumer Protections Under the Uniform Consumer Credit Code,* 41 MISS. L.J. 36, 42-3 (1969) [hereinafter cited as Robertson, *Consumer Protection*].

[9] *See* discussion at § II (A) *infra.*

[10] *See* discussion at § II (B) *infra.*

[11] Nationwide it is clear that well over 50 percent of the aggregate amount of all credit outstanding is not subject to the usury laws of the various states. Benfield, *Money, Mortgages and Migraine—The Usury Headache,* 19 CASE W. RES. L. REV. 819, 852-57, 892-99 (1968).

[12] The UNIFORM CONSUMER CREDIT CODE will be referred to alternatively throughout this article as "The UCCC" and as "The Code." Unless otherwise noted, all references are to the Revised Final Draft which was approved by the National Conference of Commissioners on Uniform State Laws on July 30, 1968. The UCCC was endorsed by the House of Delegates of the American Bar Association on August 7, 1968. *See* 54 A.B.A.J. 1026 (1968). Minor amendments were made by the NCCUSL in 1970 to avoid conflict with the Truth-In-Lending Act. These amendments were endorsed by the ABA on August 11, 1970. *See* 56 A.B.A.J. 990 (1970).

The UCCC has been enacted in the states of Utah, Oklahoma, Indiana, Wyoming, Idaho and Colorado. New consumer credit codes patterned largely after the UCCC have recently been enacted in Alabama, Louisiana, Wisconsin. In Mississippi, the UCCC was introduced as House Bill No. 878 in the 1971 Regular Legislative Session and as House Bill No. 256 in the 1972 Regular Legislative Session.

[13] There are a number of excellent, comprehensive discussions of the UCCC rate ceilings concept. These include: Johnson, *Regulation of Finance Charges on Consumer Instalment Credit,* 66 MICH. L. REV. 81 (1967); Jordan and Warren, *The Uniform Consumer Credit Code,* 68 COLUM. L. REV. 387, 388-408 (1968); Kripke, *Consumer Credit Regulation: A Credit-Oriented Viewpoint,* 68 COLUM. L. REV. 445, 446-55 (1968); Benefield, *supra* note 11, at 819; Felsenfeld, *Consumer Interest Rates: A Public Learning Process,* 23 BUS. LAWYER 931 (1968). All of these are essential reading for anyone seriously interested in understanding consumer credit rate regulation. *See also Rate Regulation Under the UCCC,* 55 MINN. L. REV. 525 (1971).

C. *Preliminary Considerations*

There are several problems of terminology which must be resolved at the outset. These problems concern (1) the nomenclature to be given to the charges imposed by credit vendors and (2) the establishment of a uniform method of computation of rates.

1. *Finance Charge Terminology*

Charges made for the extension of credit were originally denominated "interest." Then came the "service charge." Today there are a myriad of such terms in use, such as "carrying charges," "points," "discounts," "loan origination fees," "finder's fee," "time price differential," and many others. The result was that, prior to 1968, even the most sophisticated consumer had a difficult time determining exactly what he was being charged for the credit.[14]

The Truth-In-Lending Act cut through this hodgepodge and substituted one simple term, "finance charge." The finance charge includes by law:

> [T]he sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . . .[15]

2. *Rate Terminology and Computation*

The Truth-In-Lending Act also unified terminology to be used in rate disclosure. The Annual Percentage Rate (APR), basically a simple interest rate, generally is that

> [r]ate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed.[16]

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[14] The Mississippi Small Loan Regulatory Act, MISS. CODE ANN. §§ 5591-01 *et seq.* (Supp. 1971), and the Mississippi Motor Vehicle Sales Finance Act, MISS. CODE ANN. §§ 8075-01 *et seq.* (Supp. 1971), both contain disclosure requirements which were difficult to comprehend until Truth-In-Lending became law on July 1, 1968.

[15] 15 U.S.C. § 1605(a) (1970).

[16] 15 U.S.C. § 1606(a) (1) (A) (1970).

Wherever rate comparisions are made in this article, the rates will be converted to APR's.

3. "Simple Interest" and "Add On Interest"

Even though we now have the uniform terminology and method of rate computation prescribed in the Truth-In-Lending Act, an understanding of the difference between "simple interest"[17] and "add on interest" is still a necessary predicate to any consideration of rates in Mississippi.

This difference can best be explained by an illustration. Consider the case of an automobile dealer who sells a used car to a buyer on time for $1,000 with payments to be made in twelve equal monthly installments at the "rate" of 10 percent per annum. If the finance charges are computed according to the "simple interest," or declining balance, method of calculation, the total finance charge paid would be $55.00. The contract would be paid in twelve consecutive monthly payments of $87.92 each. The APR, being a "simple interest" rate, would be 10 percent. The key here is to understand that these figures include in each monthly payment finance charges on the *unpaid balance only*. If the same transaction were put on the "add on" basis, the total amount of finance charges would be $100.00. The contract would be paid in twelve consecutive equal monthly payments of $91.67. The "rate" applied would still be 10 percent, but the APR would be 18 percent. This is because the amount of finance charges imposed would then be based on the multiplication of the total principal amount of the contract by finance charge rate.[18] In fact, the amount of principal outstanding will decline each month, and it will be zero at the end of twelve months. Still, under the "add on" method of calculation, finance charges on each installment and on the final installment would be computed and charged *as though the entire principal amount of the contract were still outstanding*. This is because under the "add on" method the amount of the monthly installments is computed by adding finance charges for the full term to principal and then dividing that sum by the number of installments.

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[17] To the purist the term "simple interest" applies only to single payment obligations. In consumer credit transactions, we are concerned primarily with installment obligations. Technically, the distinction made above should be between "the annual percentage rate calculated on the declining unpaid balance" and "the add on rate". We will, however, state the comparision in terms of "simple interest" and "add on interest" in the belief that these terms will be more familiar to many readers.

[18] *Compare* MISS. CODE ANN. § 5212 (1956) *with* § 5590 (Supp. 1971).

II. CURRENT LEGAL AND ECONOMIC REALITIES IN CONSUMER CREDIT RATE REGULATION

The starting point in the development of any proposal for change is a review of the situation as it currently exists.[19] This review will be presented in two parts. First, various rate limitations, statutory and otherwise, now in effect in Mississippi will be described. Second, certain economic realities upon which any effort at modernization of our laws regarding interest rates and finance charges should be based will be considered.

A. *Statutory Rate Ceilings in Mississippi*

The following rate limitations are currently in effect in Mississippi:

(1) *General usury limitation.* The general Mississippi usury statute provides that contracts may be made in writing for a payment of a rate of interest as great as 8 percent per annum, but no more.[20] The statute further provides that if a rate in excess of 8 percent is contracted for or received, then all interest shall be forefeited. If the rate should be in excess of 20 percent, then both principal and interest shall be forfeited. The original usury statute in Mississippi even before statehood provided for an 8 percent per annum rate of interest.[21] This act remained in effect until June 25, 1822, when the legislature increased the maximum rate to 10 percent per annum.[22] The 10 percent usury limitation prevailed in Mississippi for ninety years thereafter.[23] In 1912 the legis-

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[19] For general background *see* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1965); CHAPMAN & SHAY, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION (1967); NATIONAL RETAIL MERCHANTS ASSOCIATION, ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT (1969).

[20] MISS. CODE ANN. § 36 (Supp. 1971).

[21] Apparently from the territorial days of 1805 until 1817 the written contract interest rate was 8 percent. Act of March 1, 1805, 404 Toulmin 312. However, the state's first constitution provided that no legislative change could be made in the interest rate on written contracts until 1821. MISS. CONST. art. 6, § 10 (1817). *But see* Act of 1818 at 200. Just where this left the interest rate from 1817 until 1821 is unknown.

[22] When the new capitol moved to LeFleur's Bluff (later renamed Jackson) in 1822 the legislature took advantage of the lapsing of the constitutional prohibition against changing interest rates. MISS. CONST. art. 6, § 10 (1817). Thus the new rate became 10 percent. Act of June 25, 1822, [1822] MISS. LAWS [codified in MISS. REV. CODE. ch. 105, § 2 (1823)].

[23] The rate remained unchanged for ninety years. MISS. CODE ch. 47, art. 3, §§ 1, 2 (1857); MISS. REV. CODE § 2279 (1871); MISS. REV. CODE § 1141 (1880); MISS. ANN. CODE § 2348 (1892); MISS. CODE § 2678 (1906).

lature lowered the general usury limitation to 8 percent where it has remained.[24]

(2) *Corporate loans.* Mississippi law presently provides that any corporation organized for profit may agree to pay any rate of interest not exceeding 15 percent per annum provided that the principal balance to be repaid exceeds $2,500.00.[25]

(3) *Installment loans.* Mississippi has no general installment loan act. There is, however, one general rate statute in Mississippi governing installment loans.[26] That statute expressly authorizes the add-on method of computation for interest on installment loans not in excess of 6 percent per annum. The 6 percent add-on maximum rate limitation for a twenty-four month installment loan converts into an 11.13 percent APR.[27] A special statute provides that any bank or trust company may make installment loans in an amount not exceeding $1,000.00 and charge interest at an 8 percent add-on rate, or 14.5 percent APR.[28]

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[24] In 1912 the rate was again reduced to 8 percent. Act of Feb. 24, 1912, ch. 229, § 1. [1912] MISS. LAWS. This rate has remained in effect until the present. ANN. MISS. CODE § 2075 (Hemingway 1917); MISS. CODE ANN. § 1946 (1930); MISS. CODE ANN. § 36 (1956), *as amended,* MISS. CODE ANN. § 36 (Supp. 1971). For a history of the usury problem which dates to pre-Biblical times *see* JOHNSON, INTEREST AND USURY (1969).

[25] MISS. CODE ANN. § 36 (Supp. 1971). The corporate rate exception to the general usury limitation has permitted banks and other lenders to make commercial loans at rates higher than 8 percent. This relief was necessary during the times when interest rates nationally were soaring. Because the general usury limitation was not relaxed for individual borrowers, the frequent result has been that the small businessman and farmer, generally considered to be among those being "protected" by the usury statute, have been forced to incorporate in order to get loans. The expense and inconvenience resulting from these "forced" incorporations greatly exceed any benefits being derived from the so-called "protection" afforded by the usury statute. This is particularly so in view of the fact that these small businessmen and farmers have had to pay the higher rate anyway.

[26] MISS. CODE ANN. § 5590 (Supp. 1971).

[27] In converting add on rates to APRs, it is important to note that the APR will vary slightly with the length of the contract. For example, as indicated above, 6 percent add on yields an APR of 11.13 percent on a 24 month installment loan, but only 8.98 percent APR on a 3 month loan. Also, 6 percent add on for 36 months yields 11.08 percent APR; 60 months, 10.85 percent APR; and 120 months, 10.21 percent APR.

[28] MISS. CODE ANN. § 5212 (Supp. 1971). This statute provides that, in addition to the basic 8 percent add on rate, the bank may impose "a charge in an amount not exceeding one dollar ($1.00) per one hundred dollars ($100.00), or fraction thereof, of loans for the cost of credit investigation or appraisal of the security offered as collateral". Where this is done, for a $1,000.00 loan for various maturities the true APR would be as follows: 6 months, 16.94 percent APR; 12 months, 16.21 percent APR; 18 months, 15.82 percent APR; 24 months, 15.55 APR; and 36 months, 15.11 percent APR.

(4) *Discounts.* By express statutes, the maximum discount rate here shall be the same as the maximum permissible interest rate, or 8 percent[29].

(5) *Small loans.* The Small Loan Regulatory Act[30] authorizes a basic rate charge of 2 percent per month add-on for loans of $100.00 or more.[31] When converted to yearly rate terms, this authorization provides for a 24 percent add-on rate per year or a 41.69 percent maximum APR. This rate by statute includes both interest and service charges.

(6) *Retail installment sales.* Mississippi has no retail installment sales act such as those found in many states. By decision of the Supreme Court of Mississippi, installment credit sales generally are excluded from the regulation of interest and usury laws by the "time price" doctrine.[32] Under this rule of law, so long as the seller complies with the requirements of the doctrine, he can charge the buyer whatever "time price differential" the buyer will agree to pay. In other words, there is today in Mississippi, no legal limitation on the maximum rate or amount of time price differential which may be charged in a retail installment sale.

(7) *Motor vehicle installment sales.* In the area of installment sales, the only exception to the general application of the time price doctrine is the Motor Vehicle Sales Finance Act.[33] Here, rate ceilings are classified by manufacturer's model year and stated in terms of dollars per $100.00 per year. These rate ceilings are as follows: $7.00 per $100.00 due per year on a new or one-year old model (12.75% APR); $10.00 per $100.00 due per year on a two-year old model (18% APR); $13.00 per $100.00 due per year on a four-year old model (23.25% APR); $15.00 per $100.00 due per year on a model more than four years old (26.5% APR).[34] The age of the vehicle is determinable by reference to the date of manufacture, not the date of sale.

(8) *Credit unions.* Under the Mississippi Credit Union Act, a maximum rate of 1 percent per month "on unpaid balance" may be charged.[35] This statute is worded so that add-on computation is probably pro-

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[29] MISS CODE ANN. § 36 (1956); MISS. CODE ANN. § 38 (Supp. 1971).

[30] MISS. CODE ANN. §§ 5591-01 *et seq.* (Supp. 1971).

[31] MISS. CODE ANN. § 5591-09 (b) (Supp. 1971). The Act contains no limitation on the size of loans nor is a maximum maturity limitation imposed on loans of $100 or more.

[32] *See* § II (B) *infra.*

[33] MISS. CODE ANN. §§ 8075-01 *et seq.* (Supp. 1971).

[34] MISS. CODE ANN. § 8075-14 (Supp. 1971). The APR's will vary slightly with the maturity of the contract.

[35] MISS. CODE ANN. § 5410 (1956). Compare 12 U.S.C. § 1757 (5) (1970).

hibited. Therefore the maximum rate permissible for credit unions in Mississippi is 12 percent APR.

(9) *Pawnbrokers.* The maximum permissible rate lawfully chargeable by pawnbrokers in Mississippi is 10 percent per annum.[36]

(10) *Revolving charge accounts, or credit card sales.* Most major credit card companies in Mississippi currently charge 1½ percent per month on unpaid balances (18% APR).[37]

(11) *Banks and savings and loan associations.* In Mississippi all banks and savings and loan associations are subject to the general usury limitation.[38] With the exception of the installment loan rate laws listed above[39] and the corporation loan limitation listed above[40] there are no exemptions for banks and savings and loan associations from the general usury statute.

B. The Time Price Doctrine

While not authorized by any statute, the time price doctrine is the major loophole in the effort to control rates by general usury statutes. Because of its importance in Mississippi, this doctrine deserves special treatment.

The rule in substance is as follows: A seller of merchandise may quote to the buyer a bona fide cash price and a greater time price. If the buyer accepts the time price, there is no usury involved even though the differential between the cash price and the greater time price exceeds the maximum amount of interest which could lawfully be collected.[41]

This vehicle for evading the usury laws was originally recognized by the Supreme Court of the United States in *Hogg v. Ruffner.*[42] There the Court stated what it considered to be the established rule as follows:

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[36] MISS. CODE ANN. § 5580 (1956). In connection with the recommendation hereinafter made, note should be taken that the UCCC does not apply to the rates and charges of pawnbrokers. UCCC § 1.202(4). *But see* Miller, *The Perplexing Status of Pawnbrokers Under the UCCC,* 24 OKLA. L. REV. 121 (1971).

[37] *See* note 5 *supra.*

[38] MISS. CODE ANN. §§ 36, 5288-15(g) (Supp. 1971). *See also* 12 U.S.C. § 85 (1970).

[39] MISS. CODE ANN. §§ 5212, 5590 (Supp. 1971).

[40] MISS. CODE ANN. § 36 (Supp. 1971).

[41] *See generally* Annot., 14 A.L.R.3d 1065 (1967).

[42] 66 U.S. (1 Black) 115 (1861).

> But it is manifest that if A propose to sell to B a tract of land for $10,000 in cash, or for $20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say, with apparent truth, that B pays a hundred percent for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.[43]

The Mississippi Supreme Court has long accepted the fact that one may set his own price on goods or services offered for sale, and may quote a cash price and greater time or credit price.[44] The time, or deferred payment, price may exceed the cash price by a larger percentage than that allowed under the usury statute without rendering the transaction usurious. The reasoning supporting this rule is that the additional amount of the time price is not interest but is a part of the original price charged for the goods or services.

In *Bryant v. Securities Investment Co.*, the Supreme Court of Mississippi stated the accepted rule:

> The principle is well established by the decisions of this Court that where property is sold on credit, the fact that the difference between the credit price and the cash price exceeds the percentage permitted by the usury laws will not render a transaction usurious, if the parties acted in good faith. . . .[T]his Court [has] held that a seller may charge a credit price much larger than his cash price and that in such event the difference is not interest. . . .[45]

Under the authority of *Bryant* and the other cases cited, it may be safely assumed that the time price doctrine is firmly established in Mississippi.

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[43] *Id.* at 118-19.

[44] Bass v. Patterson, 68 Miss. 310, 8 So. 849 (1890); Commercial Credit Co. v. Shelton, 139 Miss. 132, 104 So. 75 (1925); Benson v. Berry-Dampeer Co., 158 Miss. 237, 130 So. 157 (1930); Crabb v. Comer, 190 Miss. 289, 200 So. 133 (1941); Bryant v. Securities Inv. Co., 233 Miss. 740, 102 So. 2d 701 (1958); and Mullins v. Merchandise Sales Co., 192 So. 2d 700 (Miss. 1966).

[45] Bryant v. Securities Inv. Co. 233 Miss. 740, 744-45, 102 So. 2d 701, 702 (1958).

C. *Economic Realities of Rate Regulation*

1. *True Rates Are Set in the Market Place*

There are several economic realities concerning finance charges made in consumer credit transactions which must be recognized. First, in an economic sense, credit is a commodity in the same way that a television set is. A finance charge is the price at which the credit commodity sells. The true rates and amounts of finance charges, as is the case with all other prices, are largely set by the market place. The forces of supply and demand, the cost of making credit available, the cost of administering credit extension, the risk of default and the like, and many other economic factors, are ultimately going to determine the true cost of credit. Except on a temporary basis, these factors cannot be overridden or controlled by legislative fiat. Therefore, the first myth with which we must be concerned is that the true cost of credit can be, or is being, controlled by usury statutes or other rate ceilings imposed by law.

> [I]f ceilings imposed are so low that credit grantors cannot make a reasonable profit, they will either obtain a reasonable profit from some other source or by some other name or they will cease extending credit, in whole or in part. Consequently, it is no more possible for legislatures to keep down or force down rates of interest by setting maximum ceilings and maintain the same quantum of credit than it would be for legislatures to forbid inflation.[46]
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> . . . If legislative ceilings on credit charges are not consistent with basic economic principles, they will no more keep down or force down interest rates generally (and provide the same quantum of credit) than King Canute was able in the year 1028 to hold back the tidal waters of Denmark and England.[47]

2. *Low Rate Ceilings Frequently Produce Price Increases*

A closely related myth is that the imposition by law of low rate ceilings protects the consumer from excessive finance charges. This myth ignores the reality that in economics, as elsewhere, there is always a way to do indirectly that which one is prohibited from doing directly. When rate ceilings are set unrealistically low, and if credit vendors decide to stay in the market, they simply find some other way to exact from the consumer the amounts necessary to make up the true rate and finance charge which the credit vendor must have in order to earn a reasonable profit. In the installment sales field, the most obvious tactic for evading unrealistically low rate ceilings is a simple increase in the basic price of merchandise.[48]

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[46] Malcolm, *The New Maximum Charges in* R. JOHNSON, THE REALITIES ON MAXIMUM CEILINGS ON INTEREST AND FINANCE CHARGES 33 (1970).

[47] *Id.* at 34.

Consider the specifics of this contention. If a merchant selling his wares on an installment basis concluded that he actually needed a 20 percent rate on all time sales to cover his overhead and the risk of default and still permit him to make a fair profit, he could easily do this in spite of any rate limitation imposed by the state. If the 8 percent usury statute were applicable (which it is not) the merchant could easily increase the retail sales price of each item of merchandise by 12 percent. While realizing that this is an oversimplification,[49] the point is illustrated. Further, this premise is supported by evidence gathered in empirical studies.[50] Here, the politicans would have their low rate bill; the credit vendor would have his revenue; and, as is almost always the case, the consuming public would foot the bill.

This example leads us to one of the many inequities produced by low rate ceilings. When the merchant increases his retail prices because he is confronted with an unrealistic rate ceiling, the credit consumers are not the only ones who pay the fare. What happens is that cash buyers, both those who do not need credit and those who cannot get credit, are also forced to pay more for their goods and services, and consequently," carry a part of the cost of credit for which they receive no benefit."[51] Professor Lynch refers to this as the "credit consumer subsidy."

> Whenever a retailer incurs credit costs in excess of credit revenue, he must make up the loss by charging higher cash prices. The amount by which cash prices are raised to cover

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[48] *Id.* Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491, 498 (1969); Lynch, *Consumer Credit at Ten Percent Simple: The Arkansas Case*, 1968 U. ILL. L. FORUM 592, 599, 606.

[49] If the true cash price of a particular piece of merchandise were $100.00, and if the seller needed a 20 percent APR in order to economically sell on credit, the time price would be $111.16. An "add on" rate of $11.16 per $100.00 on a 12 month installment sales contract produces an APR at 20 percent. If the 8 percent usury limitation were applicable, the seller on a 12 month installment contract would be able to net only $4.39 per $100.00. If all sales were made on a time basis, our hypothetical seller would need to increase the price of the $100.00 piece of merchandise by $6.77, or about 6¾ percent. Of course, all sales are not made on time. This means that the markup economically required by the low rate ceiling would be even smaller. This, however, requires cash buyers to subsidize credit buyers.

[50] Lynch, *supra* note 48, at 599.

[51] Malcolm, *supra* note 46, at 35; National Retail Merchants Association, *supra* note 19 at 24.

> losses on credit operations represents the amount of subsidy paid by cash buyers. The recipients of the subsidy are credit customers.[52]

In short, where rate ceilings are set at unrealistically low levels, cash customers pay more. They pay part of the cost of credit, but receive none of the benefits. Conversely, in such situations, credit customers do not bear the full burden of paying the cost of one of the commodities, i.e., the credit, which they purchase.

The point is brought home by a recognition of who the cash buyers are. Generally speaking, they fall into three categories (1) the rich, (2) those who are prudent in the management of their finances, and (3) the very poor. Ordinarily, policy considerations, such as worthiness and need, would require that these be the three groups entitled to the most protection against payment of charges not economically necessary incidents to the cash sale. Yet, low rate ceilings make these groups pay for credit along with everyone else. Where is the equity in that state of affairs?

3. *Creditor Profits Do Not Fluctuate With Rate Ceilings*

Still another myth is that high rate ceilings enable credit vendors to receive unreasonably high profits. The fact is that rate ceilings do not significantly affect the creditor's profit at all. Rather, rate ceilings restrict the availability of credit, or, if they are set too low, cause creditors who maintain the same quantum of credit to continue to obtain "a reasonable profit from some other source or by some other name."[53]

There is a rather large body of public opinion which holds to the view that, regardless of rate ceilings, creditors regularly earn excessive profits. This view derives from the traditional prejudice of the public against its creditors. The facts, however, are that the creditor's gross income has declined in recent years and that he does not realize excess profits.[54]

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[52] Lynch, *supra* note 48, at 606.

[53] Malcolm, *supra* note 46, at 33.

[54] *An Empirical Study of the Arkansas Usury Law: "With Friends Like that . . .",* 1968 U. ILL. L. FORUM 544, 561 [hereinafter cited as *Arkansas Empirical Study*]. *See generally* CHAPMAN & SHAY, *supra* note 19, at 21.

A study of the cost of revolving credit in California for Sears, Roebuck & Co. for the fiscal year ending January 31, 1971, prepared by the accounting firm of Touche, Ross & Co., shows that Sears actually lost money on its revolving charge accounts. The study showed Sears' revenues from credit service charges at $27,750,000, while costs rose to $30,021,000, a net loss of $2,271,000. In percentage terms, costs exceeded

The most important fact to note here is that *creditor profit levels appear to remain substantially the same regardless of the rate ceilings.*[55] Former Senator Paul H. Douglas, the father of Truth-In-Lending and one of the foremost pro-consumer spokesmen in the country, has appropriately noted that

> [f]inance companies and other lenders have a way of earning about the same level of profit regardless of rate ceilings. There is no evidence that high rate ceilings lead to high profits and, in fact, the evidence tends to suggest just the opposite. Alabama finance companies have the highest small loan rates in the country, but one of the lowest profit rates. Likewise, Massachusetts finance companies have one of the lowest rate ceilings but one of the highest profit rates.[56]

Senator Douglas's analysis is substantiated by a recognition of the economic forces at work in the consumer credit market. Where a reasonable profit can be obtained, having in mind the cost of credit, overhead and fixed expenses, and the risk of nonpayment, "there is an independent drive by those in the business to sell."[57] Where there is an opportunity for profit, and a demand to be served, capital, almost by a process of natural selection, will be found to supply the demand. In other words, in areas where lower rate ceilings are imposed, credit vendors will concentrate on low risk customers. On the other hand, where rate ceilings are relaxed, creditors will move into higher risk markets.

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revenues by 8.2 percent. Also, J. C. Penny Company's credit costs exceeded credit service charge revenues by $22,700,000 in 1969 and by $20,500,000 in 1970.

A survey of 15 retailers, ten having annual gross sales of over $10 million and five with annual gross sales of less than $5 million for the year 1967, confirms the point being made here. "The 15 retailers surveyed collected about $36.5 million in credit service charge revenues during 1967, but incurred credit costs totalling $51.2 million, leaving a deficiency of revenue of $14.7 million. Roughly half of the deficiency originated in 30-day charge accounts, and the other half was attributable to revolving credit accounts, with the conventional installment accounts slightly above a break-even basis in the aggregate." NATIONAL RETAIL MERCHANTS ASSOCIATION, *supra* note 18, at 22, 53.

These findings of a deficiency of credit services revenues as compared with credit service costs are confirmed by recent studies in several states. Connecticut: ARTHUR ANDERSON & CO., STUDY OF FINANCE CHARGES AND RELATED EXPENSES OF REVOLVING CREDIT ACCOUNTS OF FOUR CONNECTICUT RETAILERS (1972); Iowa: PEAT, MARWICK & MITCHELL, DETERMINATION OF CREDIT REVENUE AND RELATED COSTS (1971); Minnesota: ERNST & ERNST, RETAIL CREDIT OPERATIONS STUDY (1971); Utah: R. STUCKI, UTAH CONSUMER CREDIT REPORT (1970).

[55] CHAPMAN & SHAY, *supra* note 19, at 143.

[56] Statement of Senator Paul H. Douglas to the Massachusetts Legislature, January 29, 1969.

[57] Felsenfeld, *supra* note 13, at 935.

Carl Felsenfeld has accurately summarized the existing economic realities as follows:

> It appears that, regardless of the prevailing rate levels applicable to lenders, and they do vary considerably, profit margins show a surprising equality. The type of borrowers serviced does, however, vary markedly depending upon applicable rates. The conclusion drawn is that higher rates do not necessarily increase lender profit. They do enable higher cost (both lower balance and higher risk) loans to be made and thereby broaden the coverage of the credit industry. The prevailing current view, based upon available data, is that probably the single most important function of rate regulation is to determine the size and nature of the borrower market. The higher the rate, the broader the market. Conversely, where rates are set too low, legitimate lenders depart first from the higher cost, higher risk loans. The more necessitous borrowers, those least able to protect themselves, are then inevitably forced to illegal lenders.[58]

In short, low rate ceilings eliminate consumers from the market; they do not decrease creditor profits.

4. *18 Percent Does Not Mean $18 Per $100 Per Year*

Another widely held misconception is that the rate disclosed under the Truth-In-Lending Act indicates the number of dollars per $100 of principal indebtedness paid by the debtor each year. For example, many people believe that an 18 percent APR disclosed on a revolving charge account monthly statement means that the debtor actually pays $18.00 per $100 per year. This is simply not so.

Part of the problem here relates back to the distinction made earlier between simple interest rates and add on rates. 18 percent add on is $18.00 per $100 per year. However, 18 percent simple, or 18 percent APR, is at an absolute maximum $10.02 per $100 per year.

This point is best illustrated by a simple example under a commonly used 18 percent APR revolving charge plan. A consumer buys merchandise costing $100 and plans to pay on the revolving charge plan over a period of one year. If the consumer makes the $10.00 minimum monthly payments required by the plan, he will have fully paid for the merchandise after twelve months. At the end of that time, how much will he have actually paid in finance charges? Not $18.00, not $10.00, but $9.02. On this typical revolving charge plan, the twelve month repayment schedule at 18 percent APR costs the consumer only $9.02 in finance charges. The following chart was the actual method of calculation:

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[58] *Id.* at 936.

	Initial Purchase	Monthly Payment	1½%-Finance Charge on Previous Balance	Consumer's Balance After Payment
1	$100.00	$0	$0	$100.00
2		10.00	150.00	91.50
3		10.00	137.00	82.87
4		10.00	124.00	74.11
5		10.00	111.00	65.22
6		10.00	.98	56.20
7		10.00	.84	47.04
8		10.00	.71	37.75
9		10.00	.57	28.32
10		10.00	.42	18.74
11		10.00	.28	9.02
12		9.02	0	
			9.02[59]	

5. *The Cost Components of Small Loans Must Be Considered*

There are three basic cost components in any small loan. These are (1) the cost of money, (2) the lender's fixed overhead expenses, and (3) the risk of default.[60] No lender can with impugnity ignore these costs in setting the prices on the loans he makes. Likewise, no regulatory body can afford to ignore these costs in imposing ceilings on the lender's prices.

When faced with an unreasonably low rate ceiling, the lender will lower the only one of these three cost components over which he has much control: the risk cost. He will do this by lending only to low risk consumers. Where rate ceilings are higher, the risk which the lending industry can afford to take is correspondingly higher. Here again, the raising or lowering rate ceilings does not affect creditor profits nearly as much as it affects the *availability of credit* and the *number of consumers eligible for credit.*

Low rate ceilings are invariably justified on the grounds that they protect the consumer. The foregoing analysis demonstrates that this is simply not the case. Rather, the only people protected by low rate ceilings is that small group of borrowers who, were it not for the rate ceiling, would probably have been required to pay a slightly higher rate, but are sufficiently creditworthy to receive credit at the ceiling rate.[61]

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[59] American Retail Federation, *Facts and Figures About Revolving Credit,* 1972, at 5.

[60] *Arkansas Empirical Study, supra* note 54, at 561-62; Benfield, *supra* note 11, at 826-30.

6. *Rate Ceilings Are Social Judgments, Not Rate Regulators*

When viewed in light of the economic realities involved, rate ceilings, rather than being regulators of the true rates charged for consumer credit, must be seen as social judgments concerning the kinds of people entitled to credit.[62] As former Senator Douglas has put it:

> [T]he question of the proper rate ceiling is really a matter of social policy rather than a contest between creditors and consumers. At what point does a rate become so high that society expresses the judgment that it is unconscionable and that the individual must do without the credit rather than pay the unconscionably high rates?[63]

This question is difficult enough to answer in the theory. It becomes even more difficult in view of the fact that the persons called upon to provide the answer are almost never the individuals who will be directly affected by the decision. Those making the decision are thus put in the posture of passing judgment on the needs and wants, not of themselves, but of others. They are evaluating the needs and wants of people who live under conditions, and come from socio-economic backgrounds, which usually are totally foreign to the decision-makers. The development of pluralism in this country and the marked increase in recent years in suspicion and distrust between and among ethic and socio-economic groups should have, by now, forever demonstrated the unwisdom of passing such judgments. Subject only to the outside limits of conscionability, we believe the only safe course to follow is to let the consumer seeking the credit make the decision for himself as to whether or not he will pay a high rate.

D. *The Arkansas Experience*

By way of contrast to the hodgepodge rate structure currently prevailing in Mississippi, the neighboring state of Arkansas by constitutional provision imposes a simple uniform rate ceiling of ten percent.[64] All consumer loans and credit sales are subject to this limitation. There are no exceptions.

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[61] Johnson, *The New Law of Finance Charges,* 33 LAW & CONTEMP. PROB. 671, 684 (1968); Johnson, *Interest and Usury,* in R. JOHNSTON, *supra* note 46, at 16.

[62] Douglas, *supra* note 56; Malcolm, *supra* note 46, at 34; Benfield, *supra* note 13, at 833, 874.

[63] Douglas, *supra* note 56.

[64] ARK. CONST. art. XIX, § 13 (1874). *See also* ARK. STAT. ANN. §§ 68-603, 68-609 (1957).

In vetoing the credit card rate bill, Governor Waller cited Arkansas as one of the states having lower rates than Mississippi.[65] Taking the Governor's cue, Arkansas with its low rate ceiling should provide a unique opportunity for evaluating the effectiveness of a low rate ceiling. In particular, it is interesting to see whether the low rate ceiling in Arkansas in fact affords the consumer much protection.

The Arkansas experience provides empirical verification of the economic principles discussed above. The following facts support this conclusion.[66]

First, many of the national small loan companies and finance companies simply choose not to do business in the state of Arkansas. This is so because of the "unlikelihood of a profitable operation under the 10 percent ceiling.[67] In fact, the 10 percent rate ceiling is the sole reason for the absence of one large national loan company from the state of Arkansas.[68] Therefore, the Arkansas experience indicates that low rate ceilings do restrict the availability of credit.

Another of the principles stated above is that, where creditors continue to do business under heavy rate restrictions, they will obtain a reasonable profit from some other source or by some other name. In Arkansas, credit insurance has been the primary vehicle whereby additional revenues have been obtained by lenders. A recent survey indicates that

> Little Rock lenders, especially loan company officials, were quick to point out their need to employ the credit insurance sale as a revenue-producing device—either for the lender's commission as agent for an independent insurer, or for the profit on the premium in cases where the lender is its own insurer. . . . Not only are the insurance charges higher in Arkansas, but the Little Rock lenders to some extent use property insurance solely as a revenue-producing devise.[69]

Another way through which Arkansas creditors legally earn the profit, which the constitutional rate ceiling denies, is through increased retail prices. A recent survey comparing Little Rock prices for major appliances with prices prevailing in the states surrounding Arkansas supports this conclusion.

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[65] Veto Statement, *supra* note 5.

[66] The discussion that follows rests largely upon two comprehensive articles dealing with the Arkansas situation. *Arkansas Empirical Study, supra* note 50; Lynch, *supra* note 45. The brief summary presented here is in no way a substitute for a careful reading of both of these articles. *See also Williams,* AN ANALYSIS OF RETAIL CREDIT COSTS OF SELECTED RETAIL STORES IN ARKANSAS (1970).

[67] *Arkansas Empirical Study, supra* note 54, at 574.

[68] *Id.*

[69] *Id* at 575.

COMPOSITE PRICE INDEX FOR MAJOR APPLIANCES, LITTLE ROCK AVERAGE PRICE – $100[70]

Little Rock, Arkansas	$100.00
Texarkana, Texas—Arkansas	95.88
Monroe, Louisiana	96.43
Greenville, Mississippi	96.66
Memphis, Tennessee	92.60
Springfield, Missouri	97.05
Tulsa, Oklahoma	93.09
Denver, Colorado	96.72

Next, the Arkansas experience indicates that unrealistically low rate ceilings force border city merchants to move out of state. Consider the Texarkana example. That city has 52,169 people, 21,682 of whom live in Texarkana, Arkansas and 30,487 live in Texarkana, Texas. Texas permits an 18 percent APR to be charged as compared with the 10 percent APR ceiling in Arkansas. The following table[71] strongly indicates that the Arkansas rate ceiling has forced many merchants across the state line to Texarkana, Texas.

THE LOCATION OF SELECTED RETAIL FIRMS IN TEXARKANA ARKANSAS-TEXAS FOR THE SELECTED YEARS 1955-1970

Year	Automobile Dealers		Furniture & Appliance Dealers		Department Stores	
	TA*	TT**	TA	TT	TA	TT
1955	13	25	11	20	4	3
1957[72]	10	27	14	22	3	3
1960	9	26	8	21	5	4
1962	9	25	9	17	5	4
1964	7	31	7	17	5	4
1965	5	32	8	18	5	4
1967	6	35	8	20	5	6
1969	5	37	6	23	4	6
1970	4	39	6	25	4	8

*Texarkana, Arkansas

**Texarkana, Texas

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[70] Lynch, *supra* note 48, at 599.

[71] This table was prepared by Dr. Gene C. Lynch, Associate Professor of Finance, University of Arkansas. The source of data was the telephone directories for Texarkana, Arkansas-Texas for the years indicated.

[72] Strict enforcement of the 10 percent APR rate ceiling for consumer credit sales in Arkansas did not really begin until after the decision of the Supreme Court of Arkansas in *Sloan v. Sears, Roebuck & Co.*, 228 Ark. 464, 308 S.W. 2d 802 (1957).

The resulting loss of merchants has many secondary effects. Employment opportunities move to the neighboring state. Sales tax revenues are lost. People cross the state lines. In short, the entire economic development of a border community may be retarded by unrealistically low rate ceilings.

In summary, the following conditions currently exist in the State of Arkansas: (1) There is substantially less consumer credit available than in surrounding states. (2) Lenders in Arkansas utilize various devices, principally credit insurance, to evade the usury limitation and to produce a major portion of their revenues in consumer credit transactions. (3) Retail prices in Arkansas are significantly *higher* than in neighboring states. (4) Border city merchants are gradually "encouraged" to move out of the state. It is difficult to believe that any of these conditions are of any benefit to the consuming public. It is equally difficult to quarrel with the conclusion that the proximate cause of the existence of these conditions is the unreasonably low rate ceiling in the state of Arkansas.[73]

III. RATE REGULATION UNDER THE UNIFORM CONSUMER CREDIT CODE

A. Rate Ceilings

The Uniform Consumer Credit Code[74] is fundamentally a socio-economic document. Its rules constitute social judgments made within the framework of economic fact and reality. Its draftsmen accepted the proposition that there are certain immutable economic laws with which the state cannot tamper, without producing substantial inequities. The

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[73] A study recently made in the state of Washington supports the same general conclusions. TOUCHE, ROSS, BAILEY & SMART, STUDY OF CONSUMER CREDIT COSTS IN RETAIL STORES IN WASHINGTON (1967). *See also* R. STUCKI, UTAH CONSUMER CREDIT REPORT (1970). Washington is another state cited by Governor Waller as having more acceptable rate ceilings. In 1968 Washington passed a law which reduced the credit service charge permissible in consumer credit sales from 18 percent APR to 12 percent APR. A recent study of the effect of this reduction in rate ceiling reveals that (1) the availability of credit has been reduced; (2) the price of credit has increased as the result of new credit related charges; (3) many consumers have been forced to seek more costly sources of credit; (4) the price of merchandise has increased; and (5) charges are being made for items and services previously provided without cost. GRADUATE SCHOOL OF BUSINESS ADMINISTRATION OF THE UNIVERSITY OF WASHINGTON, THE IMPACT OF A CONSUMER CREDIT INTEREST LIMITATION LAW, WASHINGTON STATE: INITIATIVE 245 (1970).

[74] The UCCC generally covers all consumer credit transactions involving $25,000.00 or less. UCCC §§ 2.104 (1), 3.104 (1). The $25,000.00 limitation, however, does not apply to a sale, loan or lease involving land. Still, the great mass of real estate credit transactions will be exempted from the regulatory provisions of the UCCC. Sections 2.104 (2) (b) and 3.105 exempt sales and loans involving an interest in land where the credit service charge of loan finance charge does not exceed 10 percent per annum.

UCCC rests upon the premise that, in the area of rates, the most effective and most equitable protection which can be afforded the consumer is found in a competitive market place.[75]

The UCCC is strictly a free enterprise statute. There are three major facets of the UCCC which are designed to promote this policy. These are (1) *rate ceilings* on the maximum finance charges allowable,[76] (2) the *freedom of entry* concept designed to increase the number of sources of credit available,[77] and (3) *disclosure* of the cost of credit.[78] Restrictive rate controls are replaced by competition in the market place as the consumer's protection against excessive rates and prices.

In the UCCC, the concept of usury has been abandoned. Rate ceilings are imposed on consumer credit extension, but, as explained below, the purpose of these ceilings is by and large unrelated to the regulation of the cost of money. The draftsmen have taken the economically sound position that money is a commodity, just like an automobile or a television set, and that its cost should be determined by the forces of competition. Accordingly, the UCCC would repeal altogether the general

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With regard to the $25,000.00 ceiling just mentioned, as well as other dollar amounts mentioned in the UCCC, an escalation formula is provided in the event of continued inflation. Section 1.106 provides that such dollar amounts in the UCCC increase 10 percent when there is a 10 percent jump in the Consumer Price Index, using December, 1967, as the Reference Base Index. In December, 1967, the Index was 118.2 The Index now being released monthly by the Bureau of Labor Statistics, U.S. Department of Labor, has been revised so that it is based on 1967=100. As of June, 1972, the Index stood at 125.0 on the base 1967=100 and 145.4 on the base 1957-59=100. In either event, the increase is more than 20 percent over the December, 1967 Index. Accordingly, the $25,000.00 limitation would be increased to $30,000.00. Other dollar limitations that would likewise be increased will be appropriately noted.

[75] For a series of studies indicating that competition operates as a fairly effective check on finance charges in most consumer credit transactions, see Jung, *Charges for Appliance and Automobile Installment Credit in Major Cities,* 35 J. of Bus. 386-91 (1962); Jung, *Commercial Bank Charges in New York and Ontario,* 3 Nat'l Banking Rev. 397-408 (1965); Jung, *Dealer Pricing Practices and Finance Charges for New Mobile Homes,* 36 J. of Bus. 430 (1960); Jung, *Terms of Home Improvement Loans,* 2 Nat'l Banking Rev. 51-60 (1964); Schweiger & McGee, *Chicago Banking,* 34 J. of Bus. 203, 255-70 (1961).

[76] UCCC §§ 2.201, 2.207 (3), 3.201, 3.508 (1969). There are a number of discussions of the UCCC rate ceilings concept available. *See* note 13 *supra.*

[77] UCCC § 3.503 (1969). *See generally* Shay, *supra* note 48, at 491; National Conference of Commissioner on Uniform State Laws, Proposed "Freedom of Entry" Amendments to Uniform Consumer Credit Code — Sponsors' Reply (1968).

[78] UCCC §§ 2.302, 2.306, 3.302, 3.306 (1969). For comprehensive discussions of disclosure generally, *see* Jordan and Warren, *supra* note 13, at 408-17; Kripke, *supra* note 13, at 455-69. For a discussion and evaluation of disclosure in Mississippi by the present author *see* Robertson, *Consumer Protection, supra* note 8, at 43-53.

usury limitation of the state where it became law.[79] With respect to non-consumer credit transactions, lenders and their borrowers would find themselves in a completely unrestricted situation where they are free to bargain and contract for whatever rate they may find mutually acceptable.[80] And why should not this be so?

The draftsmen of the UCCC encountered a hodgepodge of rate regulation statutes in practically every state in the Union.[81] In response, the UCCC promulgates a relatively simple and, with a few notable exceptions,[82] uniform rate schedule designed to be economically feasible and to be sufficiently high to permit competition in the market place to be the primary regulatory factor.

Under the UCCC the term "interest" is no longer used. Rather, the concept of the finance charge, found in the Truth-In-Lending Act, has been adopted. However, the UCCC still makes a distinction between consumer loans and consumer credit sales, so that the term "loan finance charge"[83] is used in the case of consumer loans and the term "credit service charge"[84] is used in the case of consumer credit sales. For convenience here, these terms will be grouped together under the general term "finance charge."

In general, the UCCC includes within the finance charge all charges which are imposed by the creditor and payable by the consumer as a condition of the extension of the credit. In talking about maximum rates allowable, therefore, it should be kept in mind that the UCCC includes not only interest but also all other charges in computing the Annual Percentage Rate.[85]

The general rate which creditors are allowed to charge under the UCCC is 18 percent.[86] Any business entity operating in the consumer credit field can charge for credit a finance charge not exceeding 18 percent without first obtaining a license from the administrator. These people are called "regulated lenders."[87]

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[79] House Bill No. 256, (1972 Reg. Sess.).

[80] UCCC §§ 2.605, 3.605.

[81] NATIONAL CONSUMER FINANCE ASSOCIATION, CONSUMER FINANCE RATE AND REGULATION CHART (1970).

[82] The most notable exception is the unexplained difference in the rate ceiling for finance charges for revolving charge accounts [UCCC § 2.207 (3)] and the ceilings set for finance charges for revolving loan accounts [UCCC § 3.201 (4)].

[83] UCCC § 3.109; compare 15 U.S.C. § 1605 (a) (1970).

[84] UCCC § 2.109; compare 15 U.S.C. § 1605 (a) (1970).

[85] UCCC §§ 2.304 (2), 3.304 (2); compare 15 U.S.C. § 1606 (a) (1) (1970).

[86] UCCC § 3.201 (1).

[87] UCCC § 3.501 (1) - (2).

Those desiring two charge rates in excess of 18 percent must apply to the UCCC administrator[88] for a license as a "supervised lender."[89] Banks and other financial institutions which are already subject to substantial regulation are exempt from this requirement and are deemed to be supervised lenders as a matter of law. All supervised lenders are permitted to charge a rate not to exceed 36 percent[90] for loans not exceeding $300.00, a rate not to exceed 21 percent for that part of a loan more than $300.00 and less than $1,000.00, and a rate not to exceed 15 percent for that amount of the loan over $1,000.00.[91] However, supervised lenders making substantial loans may charge a maximum of 18 percent without regard to the 15 percent limitation just noted.[92]

Merchants and retail salesmen are subject to the same rate limitations. In a consumer credit sale, the maximum finance charge which may be imposed is at the rate of 36 percent per year for the first $300.00 of the indebtedness, 21 percent up to $1,000.00 and 15 percent over and above $1,000.00 or a flat 18 percent whichever rate proves to be greater under the circumstances of the particular transaction.[93]

The following table reflects a comparison of interest limitations under existing Mississippi law with the rate ceilings which would be in effect under the UCCC:

EXISTING LAW	UCCC
GENERAL USURY LIMITATION	
8% "add on,"[94] or 14.5% APR	10.02% "add on," or 18% APR
MONTHLY INSTALLMENT LOANS	
6% "add on," or 11% APR	Up to $300.00, 20.55% "add on," or 36% APR; $300.00 to $1,000.00, 11.74% "add on," or 21% APR; Over $1,000.00, 8.31% "add on," or 15% APR; Or 10.02% "add on," or 18% APR, *whichever is greater*

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[88] The powers of the administrator with respect to supervised lenders are set forth in UCCC § 6.105.

[89] UCCC § 3.501 (3) - (4).

[90] UCCC § 3.508 (2). A 36 percent APR does not authorize a finance charge of $36.00 per $100.00 per year. On a 12 month installment loan of $100.00 at 36 percent APR, the finance charge would be only $20.48.

[91] *Id.* Under the escalation clause, note 74 *supra,* the $300.00 will probably be $360.00 and the $1,000 figure will probably be $1,200.

[92] UCCC § 2.201 (2); *see* note 91 *supra.*

[93] *Id.*

[94] An argument can be made that an 8 percent "add on" rate (14.5 percent APR) is permissible under the Mississippi usury statute MISS. CODE ANN. § 36 (Supp. 1971).

EXISTING LAW	UCCC
SMALL LOANS	
On loans over $100.0, 2% per month "add on," or 41.69% APR	Same Rates as Above
SALES OF NEW AUTOMOBILES	
7% "add on," or 12.75% APR	Same Rates as Above
USED CAR SALES	
Two Year Old Cars	
10% "add on," or 18% APR	Same Rates as Above
Four Year Old Cars	
13% "add on," or 23.25% APR	Same Rates as Above
Cars Over Four Years Old	
15% "add on," or 26.5% APR	Same Rates as Above
RETAIL INSTALLMENT SALES	
No maximum; under present case law time price differential may be whatever the buyer will pay	Same Rates as Above
CREDIT UNIONS	
1% per month "on unpaid balance," or 12% APR simple interest, or 21.5% APR "add on" interest[95]	Same Rates as Above
LENDER CREDIT CARDS[96]	
Rate usually charged is 1½% per month, or 18% APR	Same Rates as Above

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The statute is arguably ambiguous in that it does not spell out the method by which the 8 percent rate is to be computed. Also, there are cases providing that the payment of maximum interest in advance of the maturity of an obligation does not constitute usury. Hood v. First Nat'l Bank, 208 Miss. 658, 45 So.2d 251 (1950); Beck v. Turner, 147 Miss. 401, 113 So. 209 (1927); Kornegay v. Georgia State Bldg. and Loan Ass'n, 91 Miss. 551, 44 So. 783 (1907). This proposition, insofar as it might apply to "add on" interest in excess of 6 percent (11 percent APR) but less than 8 percent (14.5 percent APR) is questioned by implication in Fayard v. Paris, 254 So.2d 773 (Miss. 1971). "Add on" computation is also rather difficult to reconcile with Taylor v. Copeland, 183 Miss. 85, 181 So. 742 (1938). Except as authorized under express statutes, e.g., Miss Code Ann. §§ 5212 and 5590 (Supp. 1971), it would be prudent to assume that "add on" computation is prohibited under the general usury statute.

[95] Though the contrary is arguable, the statute [MISS. CODE ANN. § 5410 (1956)] is worded so that "add on" computation is probably prohibited. Compare 12 U.S.C. § 1757 (5) (1970).

EXISTING LAW	UCCC
SELLER CREDIT CARDS[97]	
Rate usually charged is 1½% per month, or 18% APR	2% per month, or 24% APR up to $500.00 of debt; 1½% per month, or 18% APR over $500.00 of debt

All finance charge rates contained in the UCCC are computed by the actuarial or "simple interest" method. This conforms to the APR computations required under the Truth-In-Lending Act. A prevalent practice under existing Mississippi law is to use the "add on" method of computing rates. It is important to keep this distinction in mind in comparing the UCCC with existing law.

The most telling comparison appears in the small loan area. Present law authorizes a rate of 2 percent per month add on.[98] This rate produces an APR of 41.69 percent! This rate ceiling applies, *regardless of the size of the loan*. The UCCC, on the other hand, authorizes a maximum rate of 36 percent, but after the first $300 drops the ceiling to 21 percent for additional sums more than $300 but less than $1,000 with a further reduction to 15 percent required over $1,000.

The following table graphically illustrates the potential difference between the maximum rates and maximum finance charges permissible under the UCCC compared to existing Mississippi law.

COMPARISON OF RATE CEILING UNDER UCCC AND PRESENT MISSISSIPPI LAW[99]

(12-month installment loans)

	Loan Size				
	$100	$300	$500	$1,000	$1,500
Present:	$ 24.00	$ 72	$120	$240	$360
APR	% 41.69	% 41.69	% 41.69	% 41.69	% 41.69
UCCC:	$ 20.48	$ 61.68	$ 93.88	$158.36	$211.68
APR	% 36.00	% 36.00	% 33.02	% 28.05	% 25.10
Net Difference	$ 3.52	$ 10.32	$ 26.12	$ 81.64	$148.32

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[96] *E.g.*, BankAmericard, Master Charge. As with other "lenders," these credit card companies would have to qualify as "supervised lenders" before they could charge in excess of 18 percent per annum on small balances.

[97] *E.g.*, Sears Revolving Charge.

[98] Miss. Code Ann. § 5591-09(b) (1956).

[99] This table was prepared by Dr. Robert W. Johnson, Professor of Industrial Administration, Purdue University, and was presented to the Mississippi House Judiciary "A" Committee at hearings on the UCCC on March 1, 1972.

Legislative controversy is certain to result when the rate ceilings provisions of the UCCC are considered. However, in view of the fact that the consumer today is regularly required to pay almost 42 percent APR under the present small loan laws of this state, with the possibility of rates in excess of that under the time price doctrine, opposition to the UCCC rate ceiling concept in Mississippi would seem to be a bit misplaced.

Furthermore, the draftsmen of the UCCC vigorously advance their belief that rates actually charged by creditors will be nowhere near the ceiling permitted under the new law. They argue that competition will keep the rates actually being charged well below ceilings. They argue that, if a debtor is charged the maximum rate, this will be because of his lack of creditworthiness alone. Initial reports from Utah[100] and Oklahoma, the first two states to adopt the UCCC, seem to support this theory. In any event, whether this actually takes place in Mississippi or not, the new rate ceilings concept of the UCCC, when compared with the oligopolistic hodgepodge of present Mississippi law, represents a substantial advance.

B. Freedom of Entry

Free entry into the consumer credit market must be available if the free enterprise system and competition are to keep rates below the maximum levels just discussed. Freedom of entry, coupled with full and adequate disclosure of the cost of credit, should have this desired effect.[101]

Under the UCCC, persons engaging in the business of making supervised loans (finance charge in excess of 18 percent) need to be licensed, unless already a supervised financial organization such as commercial banks, savings banks, savings and loan associations and credit unions. This license is granted by the Administrator upon a finding that the financial responsibility, character and fitness of the applicant warrant belief that the business will be operated honestly and fairly.[102] The license is permanent and allows the licensee to do business in more than one office.

For all practical purposes, Mississippi is a free entry state under existing law. When the licensing requirements of our Small Loan Privilege Tax Act[103] are compared with the freedom of entry provisions of the UCCC, it is readily apparent that they are substantially similar. Accordingly, we do not believe that the free entry provisions of the UCCC would represent a substantial change from existing state laws.

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[100] STUCKI, UTAH CONSUMER CREDIT REPORT 12-13, 30, 33, 40-41, 61-78 (1970).

[101] UCCC § 3.503, official comment.

[102] UCCC § 3.503 (2).

[103] MISS. CODE ANN. § 5591-39 (Supp. 1971); UCCC § 3.503.

It should be noted that by regulation, the State Bank Comptroller has attempted to require that before a license may be issued the applicant must demonstrate that "the granting of such license will promote the convenience and advantage of the community in which the licensed office is to be located."[104] Since the statute[105] requires only that the applicant demonstrate "financial responsibility, previous experience, character and general fitness," the regulation, which substitutes an entirely new test, is probably illegal and unenforceable.

Freedom of entry is necessary under the UCCC in order to assure the availability of an adequate supply of credit. Because of the strong consumer reforms in the area of practices and remedies, some creditors in Mississippi now take the position that, if the UCCC becomes law, they will stop extending credit to persons considered to be marginal credit risks. In this way, it is argued, the UCCC would hurt the consumer, not help him. The Code free entry provisions are designed so that, if some existing creditors do become more restrictive in their credit practices, the field will be open to others, who can demonstrate financial responsibility, character, and fitness, to fill the vacuum. In the long run, the propensity of capital to seek profits will prevent creditor's from becoming too conservative. As explained above, the history of our capitalistic economy reflects that opportunities for investment and profit are seldom overlooked for long.

C. *Disclosure*

Disclosure of the cost of consumer credit is the third component of the UCCC free enterprise theory. The consumer can shop for credit most effectively when the costs of credit are disclosed to him in simple, meaningful terms. As explained above, the Truth-In-Lending Act establishes a uniform method of computing and disclosing finance charges and rates. Thus, comparison shopping is at least "possible" today.[106]

The Truth-In-Lending Act contains a provision which authorizes the Federal Reserve Board to grant exception from compliance with the federal act to any state with a similar disclosure act containing adequate provisions for enforcement.[107] The UCCC disclosure rules are designed to be sufficiently similar to the Truth-In-Lending Act to permit this exemption to be granted.

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[104] State Bank Comptroller Reg. II (a), adopted Nov. 7, 1966. *Compare* UCCC § 3.503, official comment no. 1.

[105] Miss. Code Ann. § 5591-39 (Supp. 1971).

[106] The author is under no illusion that disclosure is that be-all and end-all of consumer credit reforms. For a further discussion, *see* Robertson, *Consumer Protection, supra* note 8, at 49-52.

Whether we adopt the UCCC or not, the disclosure law is here to stay. The only decision for Mississippi as a practical matter, is whether compliance with the disclosure law will be policed by a strong federal administrator or by a strong state administrator. Anyone who advocates the enactment of the UCCC expecting that he will thereby be able to avoid compliance with the Truth-In-Lending disclosure requirements is extremely shortsighted. As indicated above, the UCCC disclosure requirements are practically identical to those found in the federal law.

D. Competition as Regulator

Mississippi has historically considered the economic rules of a free enterprise system with great reverence.[108] Still, there will no doubt be many skeptics who will question the efficacy of economic competition as a rate regulator. Because Mississippi has in the past "controlled" rates by an awkward array of statutory limitations, empirical proof is lacking. There are, nevertheless, several indicators which ought to be considered.

First, as indicated above, the time-price doctrine is legally structured so that it contains no rate limitations. Literally, the sky is the limit. Bear in mind that retail installment sellers not only are exempt from rate limitations but also are answerable to no administrator or policing authority. For this particular credit vendor, the forces of competition in the market place are the sole regulator. It is doubtul that a survey of retail merchants in this state would reflect appreciable rate abuse. There will be found few if any instances where rates are being imposed anywhere near the 41.69 percent APR commonly used by the heavily regulated small loan companies.

Second, competition has proven itself an effective regulator of rates in the automobile finance industry.[109] Though Mississippi has relatively low statutory ceilings for automobile finance charge rates, competition has generally kept rates below the ceilings. To some extent, the picture has been obscured by inflation, but it seems likely that finance company profits have not suffered. Rather, the rate ceilings have been avoided through such devices as "add on" rate computation, higher re-

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[107] 15 U.S.C. § 1633 (1970).

[108] It must be recognized that a usury statute is the complete antithesis of free enterprise economics.

[109] R. SHAY, NEW AUTOMOBILE FINANCE RATES, 1924-62, at 11 (1963); *cited in* Shay, *supra* note 48, at 491-92.

tail prices, use of extras such as credit insurance, added discounts on the negotiation of chattel paper, just to name a few. In any event, it is logical to believe that the automobile finance industry, both in Mississippi and nationwide, has been one segment of the consumer credit economy where competition has proven itself a far more effective rate regulator than arbitrary statutory rate ceilings.[110] The experience of this industry supports the proposition that rates do not rise to the statutory ceiling, even where the ceilings are relatively low.

Third, it should be instructive to study the experience of the two states which have no general usury statute: Massachusetts and New Hampshire. A recent survey has shown that rate levels generally in Boston, where there is no usury limitation, were somewhat *lower* than rates being charged in several neighboring states which have quite restrictive usury laws.[111] Here again we find evidence that the market place can be an effective regulator.

Based on experiences such as those mentioned above, the draftsmen of UCCC have devised their Code to foster a healthy, competitive atmosphere in the consumer credit industry. By assuring an adequate availability of credit and strictly enforced disclosure requirements, the market place should provide the consumer with far more protection than usury laws and low rate ceilings ever have.

E. UCCC Reforms in the Law of Remedies and Practices

As a socio-economic document, the UCCC has been designed to strike a fair and realistic balance between the competing interests affected. Accordingly, there are, in addition to the rate competition theory stated above, a number of major reform provisions throughout the Code designed to protect the consumer. These lie primarily in the areas of creditor practices and remedies.[112]

One of the consumer protection provisions of the new Code is found in the abolition of the holder in due course doctrine in consumer credit transactions.[113] The closely related waiver of defense clause meets a similar fate.[114]

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[110] The National Commission on Consumer Finance is presently engaged in the compilation of extensive data, on a state by state basis, concerning the behavior of rates vis-a-vis statutory rate ceilings. Mississippi is included in that study. Final results of the commission's study are expected to be released on or about January 1, 1973.

[111] Benefield, *supra* note 11, at 839 n. 102.

[112] The UCCC reforms in the law of remedies and practices have been thoroughly evaluated by the author elsewhere. Robertson, *Consumer Protection, supra* note 8, at 52-75. That discussion, properly speaking is beyond the scope of the present article. The material presented here is intended to be nothing more than a highlighting of the major consumer credit reforms, found in the UCCC designed to illustrate the Code's balance.

In the case of a home solicitation sale, the buyer is given the right to cancel the same until midnight of the third business day following the sale.[115] In an effort to deal with referral sales schemes frequently practiced by door-to-door salesmen, the new Code provides that the seller may not give or offer a rebate or discount as an inducement for a sale if the earning of the rebate or discount is contingent upon the occurrence of an event subsequent to the time of the sale.[116]

The UCCC contains rules designed to curb the greediness of some creditors. Except in the case of a purchase money security interest or a security interest in goods arising out of an earlier consumer credit sale between the parties, the seller of goods may take a security interest in goods or lands of the debtor, other than the goods which are the subject of the sale, only if the debt secured is substantial.[117] The additional goods can serve as security only where the debt secured is greater than $300.00.[118] And, in the case of a consumer credit sale or in the case of a supervised loan, the creditor may not take a security interest in real estate if the debt secured is less than $1,000.00.[119] Any security interest taken in violation of these rules is void.

Deficiency judgments are greatly restricted under the UCCC.[120] The new Code gives the foreclosing creditor an option. He may repossess the collateral, or he may sue on the underlying note which he holds, but he may not do both. Here the Code rules apply only to consumer credit sales and do not cover consumer loans.

The UCCC contains a number of provisions designed to protect the wages of the consumer.[121] Pre-judgment garnishments are flatly prohibited.[122] Further, 75 percent of the consumer's disposable earnings are exempt from levy. Irrevocable assignments of earnings are banned, employers are prohibited from discharging an employee because of a garnishment arising out of a consumer credit transaction.

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[113] UCCC § 2.403.

[114] UCCC § 2.404. *See also* Robertson, *Consumer Protection, supra* note 8, at 52-59.

[115] UCCC § 2.502. *See also* Robertson, *Consumer Protection, supra* note 8, at 60-64.

[116] UCCC § 2.411. *See also* Robertson, *Consumer Protection, supra* note 8, at 64-65.

[117] UCCC § 2.407. *See also* Robertson, *Consumer Protection, supra* note 8, at 65-67.

[118] This amount is subject to change pursuant to the provision on adjustment of dollar amounts. *See* note 74 *supra.*

[119] This amount is subject to change pursuant to the provision on adjustment of dollar amounts. *See* note 74 *supra.*

[120] UCCC § 5.103. *See also* Roberston, *Consumer Protection, supra* note at 8, at 68-70.

[121] UCCC §§ 5.104, 5.105, 5.106, 2.410. *See also* Robertson, *Consumer Protection, supra* note 8, at 70-75.

[122] *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Present Mississippi law prohibits pre-judgment garnishments. Miss Code Ann. § 2783 (1956).

In addition, confession judgment are banned.[123] There are rules designed to protect the consumer against excessive delinquency charges[124] or other additional charges.[125] Other rules restrict and control the practice of refinancing,[126] while still others insure that the consumer can pre-pay his debt at any time without penalty.[127] The UCCC also regulates balloon payments[128] and contains needed protections for the consumer signing a balloon note. Limitations on the default charges[129] and attorneys' fees[130] in the event of foreclosure or other default proceedings by the creditors may also be found in the UCCC. Extortionate extensions of credit[131] and "unconscionable" terms[132] in consumer credit transactions are also proscribed. Civil[133] and criminal penalties[134] are provided for violations of the consumer protection provisions of the Code.

The presence of these and other pro-consumer reforms constitute an additional reason for the adoption of relatively high rate ceilings. Inevitably, each of these restrictions on practices and remedies will cause increased costs to the creditor.[135] The rate structure of the Code would permit the creditor to bear these increased costs, and still make a fair profit. Under the UCCC, unlike the Arkansas experience cited above, these costs would be borne entirely by credit consumers, not by cash buyers. In a very real sense, these reforms and the added costs that they produce benefit all credit consumers. It is, therefore, just and equitable that creditors be permitted to charge rates which would permit them to realize fair profits without having to resort to backhanded or evasive practices.

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[123] UCCC § 2.415. *See also* Robertson, *Consumer Protection, supra* note 8, at 67-68. Compare D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972).

[124] UCC §§ 2.203, 3.203.

[125] UCCC §§ 2.202, 2.204, 3.202, 3.204.

[126] UCCC §§ 2.205, 2.206, 3.205, 3.206.

[127] UCCC §§ 2.209, 2.210, 3.309, 3.310.

[128] UCCC §§ 2.405, 3.402.

[129] UCCC §§ 2.414, 3.405.

[130] UCCC §§ 2.413, 3.404.

[131] UCCC § 5.107.

[132] UCCC §§ 5.108, 4.106.

[133] UCCC §§ 5.203, 6.113.

[134] UCCC §§ 5.301, 5.302.

[135] In the case of responsible, legitimate creditors, who make up the overwhelming majority of the consumer credit industry, most of these added costs will merely be in the form of "red tape" type expenses necessary to stay in compliance with the law.

IV. CONCLUSION

We end basically where we began. Consumer credit rate regulation in Mississippi is a tangled web of confusion, explainable, more in terms of a series of historical accidents, than in terms of sound economic principles. Governor Waller's call for an in-depth study of rates and for the development of proposals for the modernization of Mississippi's rate structure is a forward step. It is respectfully suggested, however, that the proposed study include a thorough consideration of the economic realities of consumer credit rate regulation. Only when the myths have been discarded can we hope to achieve true economic justice for both the consumer and his creditor.

CONSTITUTIONAL LIMITS OF STATE DEBT: THEIR EFFECTS ON INTEREST COSTS

Dr. Kenneth W. Hollman and Dr. Walter J. Primeaux, Jr.***

I. Introduction

In recent years, Mississippi has experienced difficulty in obtaining sufficient revenues to provide the expansions in the quantity and quality of public goods and services demanded by the residents of the State. As with most other states, Mississippi has raised taxes several times, but general operating revenues have remained insufficient to cover both operating budgets and expansions in capital outlays. To provide for the latter, Mississippi has been forced to resort to borrowed funds on a large scale. As a result, the State's debt has grown rapidly, and a significant portion of each year's budget is dedicated to interest requirements.[1] Economists in Mississippi in recent years have expressed interest, albeit infrequently, in the State's expenditures and in the revenue sources available to public authority in the State, but they have paid surprisingly little attention to the State's debt. This important phase of the State's economic process is also worthy of attention and that is the subject of this study.

A state's constitution may place limits on the amount of debt which that state may incur.[2] As the state approaches that limit, it is

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[1] In 1969, $15,427,000, or 2.9 percent of the State of Mississippi's total direct expenditure of $526,426,000, was allocated to interest payments on the debt. U.S. Department of Commerce, Bureau of the Census, State Government Finances in 1969, at 27 (1970) [hereinafter cited as 1969 State Finances].

[2] Mississippi has relatively liberal constitutional limitations on the amount which the State may borrow. The text of the State's constitutional debt provision is as follows:

> Neither the State nor any of its direct agencies, excluding the political subdivisions and other local districts, shall incur a bonded indebtedness in excess of one and one half (1½) times the sum of all the revenue collected by it for all purposes during any one of the preceding four fiscal years, whichever year might be higher. Miss. Const. art. 5, § 115 (as amended 1960).

In contrast, many state constitutions are quite restrictive as to the amount and purpose of state borrowing. The Alabama state Constitution, for example, provides that:

> After the ratification of this constitution, no new debt shall be created against, or incurred by the state, or its authority except to repel invasion or suppress

faced with the alternatives of (1) curtailing or not expanding the quality and quantity of public services, or (2) resorting to debt instruments which are not included in the debt ceiling. Revenue bonds provide the means of following the second alternative.[3] Revenue bonds bear a higher interest rate than general obligation bonds which have the same covenants and which are issued under similar circumstances. Obviously, to the extent that a state must rely on revenue bonds, instead of general obligation bonds, to fund projects demanded by the citizens of the state, it incurs higher interest costs. This outcome is expected because these bonds bear a higher interest rate than general obligation bonds. Debt ceilings, therefore, cause a state to pay more interest on debt than would be necessary in the absence of such limits. The above discussion reveals that constitutional limits on state debt can be a significant factor affecting the amount of interest charges paid by a state. Furthermore, since constitutional limitations are subject to modification, it may be beneficial for a state to evaluate the extent to which these restrictions cause tax monies to be directed to such non-productive uses as paying an interest rate which is *higher* than the rate which would apply if the debt ceiling were raised or completely removed. This article relates the above considerations to the State of Mississippi; and the purpose of this study is to test the hypothesis that the provisions of the Mississippi State Constitution cause the interest costs of State debt to be higher than they would be if the State were permitted to rely more heavily on general obligation bonds instead of revenue bonds for funding State

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> insurrection, and then only by a concurrence of two-thirds of the members of each house of the legislature, and the vote shall be taken by yeas and nays and entered on the journals; provided, the governor may be authorized to negotiate temporary loans, never to exceed three hundred thousand dollars, to meet the deficiencies in the treasury, and until the same is paid no new loan shall be negotiated; (provided, further, that this section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the state . . .). Any act creating or incurring any new debt against the state, except as herein provided for, shall be absolutely void. . . . Ala. Const. amend. XXVI, art. 23, § 213.

For a thorough but dated explanation of the types and effectiveness of the constitutional debt provisions in other states, see J. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 28-35 (1963).

[3] Revenue bonds are issued to fund particular projects. Theoretically, the revenue from those projects are dedicated to liquidate the bond issue. In reality, earmarked taxes, certain pledged revenues, or a grant from general revenues may be used to service these bonds. General obligation bonds are secured by the credit and integrity of the state, only. It is generally considered that statutory limits to state debt apply to general obligation bonds but not to revenue bonds. These two types of bonds are discussed more fully in Section III of the paper.

debt. Findings of the study could aid State officials in their efforts to improve financial efficiency and aid in the State's economic growth.

II. Reasons for the Increasing Debt

Information concerning the size and the accelerating rate of growth of the national debt is often noted by newspapers and other mass media. Much less publicized, however, is the tremendous growth in state and local debt. Yet the debt of state and local governments in the United States has grown much faster than the national debt in the last decade; from 1960 to 1969, the national gross debt rose from $286,331 million[4] to $353,720 million,[5] an increase of 23.5 percent. In the same time period, the total state and local government debt mushroomed from $69,955 million[6] to $133,548 million,[7] an increase of 90.9 percent. Various states experienced different rates of debt growth during the 1960 to 1969 period. Mississippi's state and local governments, however, being located as they are in a state undergoing far-reaching economic and social changes,[8] shared in this growth to an extensive degree. The total debt of Mississippi state and local governments increased from $594 million in 1960[9] to $1,166 million in 1969,[10] a rise of 96.3 percent. There is no indication that the rate of growth will abate in the predictable future.

Mississippi's large state and local debt is a cumulative result of the State's continuously growing financial needs in the post World War II era caused by several basic changes in the State's society and economy. These causal factors are by-products of a differing growth rate (or decline) in population age groups, an increasing rate of industry acquisition, increasing urbanization, a shifting emphasis as to major public goals, and an increased economic well being.

Mississippi has had several fundamental age composition shifts in the last two decades, the most important of which may be the increase in the number of people in the dependent age groups (under 18 and over 65) who require the most costly public services.[11] This change has tended to erode the State's tax base and placed an added economic burden on workers in the productive age groups (18 to 65). In the same time period, there has been a trend toward industrialization, so that the manufacturing sector has taken its place alongside agriculture as a mainstay in the State's economy. The value added by manufacturing in Mississippi increased from $642 million in 1958[12] to $1,635 million in 1967,[13] an increase of 154.7 percent. With the rapid industrialization have come the problems of water and air pollution, though the intensities of these problems are probably not as great in Mississippi as in some other states.[14] As the trend toward industrialization grew apace in Mississippi, there was a simultaneous increase in urbanization, since workers moved from farm to city to fill the newly created positions in industry; the State was only 37.7 percent urban in 1960,[15] but it was 44.5 percent urban in 1970.[16] This urbanization trend is important because urban residents have historically demanded that government provide many services which their rural counterparts do without or provide for themselves. Urbanization has helped to contribute to the problems of congestion, inadequate housing, increased crime and other social ills. All the above mentioned changes have been concomitant with the State's and nation's dramatic economic growth and the general increases in the standard of living and personal income level. The changes have increased the demand for more complex schools and equipment and better trained teachers, a more comprehensive public welfare and public health system, better and more expensive roads to accomodate a larger number of vehicles, better law enforcement to cope with the unavoidable problems that arise between persons living in close proximity, more recreational facilities to satisfy a greater leisure inclination, and other publicly supplied goods and services. This tremendous increase in demand, whose growth has tended to outstrip the population and tax base, indicates that the State is not making the transition to an industrialized and urbanized society without financial and other difficulties. Obviously, with the financial tasks which lie ahead growing rapidly, the State must place itself in the soundest possible circumstances as it enters the decade of the 1970's.[17]

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[4] Tax Foundation, Inc., Facts and Figures on Government Finance, 1971, at 22 (16th ed. 1971).

[5] *Id.*

[6] *Id.* at 127.

[7] *Id.* at 127.

[8] Many social and economic changes and their impact on the population of Mississippi in the intercensal period from 1960 to 1970 are discussed in Department of Labor Center for Manpower Studies, Mississippi's Population (1960-1970): General Characteristics (1971).

[9] U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1962, at 424 (1963).

[10] Tax Foundation, Inc., *supra* note 4, at 128.

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[11] MISSISSIPPI'S POPULATION (1960-1970), *supra* note 8, at 2.

[12] STATISTICAL ABSTRACT OF THE UNITED STATES, 1962, *supra* note 9, at 780.

[13] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, at 699 (1970).

[14] *See generally* Note, *Water Pollution Control in Mississippi,* 41 MISS. L. J. 351 (1971).

[15] STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, *supra* note 13, at 17.

[16] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, MISSISSIPPI ADVANCE REPORT, PC (V1) -26, 3 (1970).

The aforementioned changes taking place within Mississippi during the 1960-1969 period required additional expenditures. The revenue requirements discussed above were of such a nature that they were not easily overlooked or deferred; therefore, in the absence of current tax revenue sufficiently large to offset the expenditure, State debt was the alternative.

III. CHARACTERISTICS OF THE MISSISSIPPI STATE DEBT

Certain characteristics of a state's debt help to identify the financial position of that state; they also help place the state's debt and deficit financing activities in the proper perspective as an integral part of the state's total financial arrangement. As an introduction to the study of Mississippi's debt and deficit financing system in 1969, the State's debt will be discussed in terms of its length of maturity, bond rating and interest rate paid, service requirement, functional distribution, and type of bonds.

A. Length of Maturity

All Southeastern states[18] had a very large part of their total gross debt in long-term bonds [19] in 1969. In 1969, Mississippi's debt amounted to $447,011,000. Of this amount 99.2 percent, or $443,432,000, was in the nature of long-term bonds. The balance of the State's debt (only .8 percent of the total) was in the form of short-term bonds.[20] Only seven of the other ten states in the Southeastern region had any short-term debt outstanding in 1969. North Carolina had 20.6 percent of its debt in short-term form, the laregst percentage for any state in the region. Tennessee was close behind with a 19.4 percent figure. Kentucky was a distant third with a figure of 4.9 percent, followed closely by Arkansas with a figure of 2.3 percent. Mississippi, Alabama, and Louisiana recorded figures of .8, .4, and .4 percent, respectively.[21]

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[17] The social and economic changes which impinge on the Mississippi state and local debt are not unique to this state. Interesting parallels can be drawn, for example, between Mississippi and Texas. *See* Anderson, *State and Local Debt in Texas: A Profile,* 37 TEX. BUS. REV., Jan. 1963, at 4-6, for a discussion of the state and local debt situation in Texas. For a discussion of such changes with respect to all state and local government debts combined, see *State and Local Government Debt, Part 1,* MONTHLY REV., FEDERAL RESERVE BANK OF RICHMOND, June, 1966, at 2-5; and *State and Local Government Debt, Part 2,* MONTHLY REV., FEDERAL RESERVE BANK OF RICHMOND, Nov., 1966, at 2-5.

[18] States included in the Southeast, for the purposes of this study, are: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. This group of states will also be referred to as the regional states.

[19] Long-term debt is defined as "debt payable more than 1 year after date of issue." 1969 STATE FINANCES, *supra* note 1, at 56.

[20] Short-term debt is "interest-bearing debt payable within 1 year from date of issue, such as bond anticipation notes, bank loans, and tax anticipation notes and warrants." 1969 STATE FINANCES, *supra* note 1, at 58.

B. Bond Ratings and Interest Rates Paid

From all indications, the bonds of the Mississippi State government are well received in the securities markets. This may be due in part to the favorable credit rating given this government's bonds by Moody's Investors Service, Inc. and other rating services. Almost all of the State's bonds which are rated are given a near-top quality rating in terms of earnings and risk. This rating is based on past debt service record, debt outstanding measured on a per capita or assessed property valuation basis, general financial condition and estimated revenue generating potential, economic outlook, and other factors.[22] All bonds of state and local governments in Mississippi and other states are not rated; for example, Moody's does not rate bonds of any educational institution, issuers with less than a $600,000 total debt, projects under construction when the bonds are floated, issuers without a proven capacity to generate earnings, or the bonds of any government which lacks the necessary financial data for an accurate determination of its ability to service a debt.[23]

Bond ratings are of concern to investors, large financial institutions, and state and local governments. Investors are interested in the quality of the bonds in which they invest their money, for obvious reasons. Ratings are important to commercial banks and other financial institutions, since they are required by law to hold only securities of a certain quality; banks, for example, may hold only those bonds which are rated Baa or above. Also, bonds below a certain rating cannot be used as collateral by borrowers from commercial banks.[24] Ratings are even more important to state and local governments, since the rating they receive determines to a large degree the interest rate which they must pay on their bonds.

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[21] 1969 STATE FINANCES, *supra* note 1, at 40. Percentage computations are by the authors from data contained in the above source.

[22] The ratings and the factors upon which the rating is based are found in MOODY'S INVESTORS SERVICE, INC., MOODY'S MUNICIPAL AND GOVERNMENT MANUAL, 1969, at 1495-1502 (1970) [hereinafter cited as MOODY'S MANUAL] and *State and Local Government Debt, Part 2, supra* note 17, at 2-3.

[23] *State and Local Government Debt, Part 2, supra* note 17, at 2-3. The ratings range from Aaa, signifying the least speculative securities, to C, representing the lowest quality bonds. *See* MOODY'S MANUAL, *supra* note 22, at 6.

[24] *State and Local Government Debt, Part 2, supra* note 17, at 2-3.

Mississippi's average interest rate in 1969 was 3.5 percent. This placed it below four of the eleven selected Southeastern states and tied it with one; Alabama led the group with a figure of 4.4 percent and Virginia was last with a figure of 2.6 percent..[25] Mississippi's position reflects favorably on its economic soundness and general credit rating.

C. *Functional Distribution of Debt*

More bonds outstanding in Mississippi in 1969 had been issued for the purpose of securing funds for maritime facilities than for any other single function.[26] Maritime facilities bonds outstanding in 1969 totaled $157,443,000, or 35.5 percent of Mississippi's total long-term debt of $443,432,000.[27]

In descending order, education and highways vied for second and third places, respectively, in the array of the State debt outstanding by function. Education bonds outstanding in 1969 totaled $105,645,000 and accounted for 23.8 percent of Mississippi's total long-term debt. Local schools and "other education" received $63,700,000, or 14.4 percent of the funds derived from the sale of bonds outstanding, while state institutions of higher education received $41,945,000, or 9.5 percent of the funds.[28]

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[25] The average interest rate for Mississippi in 1969 was computed by dividing the State's total interest paid ($15,427,000) by its total outstanding debt ($447,011,000). 1969 STATE FINANCES, *supra* note 1, at 27, 40. Figures for the other states were computed in the same manner.

[26] Mississippi had three port development or improvement bond issues outstanding in 1969. The largest of the three issues (and chronologically the most recent) was for the purpose of developing a shipbuilding facility for Litton Industries in the Port of Pascagoula. These general obligation bonds (see footnotes 31 and 32 for the definition of general obligation and revenue bonds, respectively) were issued on December 1, 1967 in the amount of $130,000,000 and were outstanding in the same amount on June 30, 1969.

Bonds have been issued for port improvement (as contrasted to port development) in two Mississippi Gulf Coast cities, Pascagoula and Gulfport. Port of Pascagoula bonds are of both the general obligation and revenue bond type. They have been issued in the total amount of $19,000,000; $18,280,000 of these bonds were outstanding on June 30, 1969.

The Gulfport bonds are all of the general obligation type. They have been issued in the aggregate amount of $9,460,000; $9,163,000 of these bonds were outstanding on June 30, 1969.

Data relating to maritime facilities bonds are found in MOODY'S MANUAL, *supra* note 22, at 1500-1501; and [1967-1969] MISS. TREAS. BIENNIAL REPORT, at 69, 72, 74. MISS. CODE ANN. § 7564-20 (Supp. 1971).

[27] 1969 STATE FINANCES, *supra* note 1, at 40-41.

[28] *Id.*

Highway bonds outstanding in 1969 amounted to $105,280,000 and accounted for 23.7 percent of the total long-term State debt. Bonds comprising the rest of the debt were issued for the purpose of securing funds to finance "other" functions. The "other" category, which includes bonds issued for police, non-highway transportation, public welfare, housing and community development, and miscellaneous functions, amounted to $75,065,000, or 16.9 percent of the total long-term debt.[29]

The "average" southeastern state had about 50 percent more of its debt in highway and education bonds than did Mississippi. (Mississippi's percentage of debt devoted to higher education was about one-half of that for the "average" Southeastern state, but the two were approximately equal for local and other education.) Mississippi's maritime facilities bonds outstanding as a percentage of total debt were about six times that of the "average" Southeastern state, and the percentage of Mississippi's debt in "other" bonds was slightly higher than for the "average" regional state. The "average" Southeastern state had almost two percent of its debt in hospital bonds and slightly less than that proportion in bonds issued for veterans' bonuses; Mississippi had bonds outstanding in neither area in 1969.[30]

D. *Types of Bonds*

Because of the demands for public goods and services discussed above, Mississippi, like its counterparts all over the country, has been very much concerned about how much to borrow and how to secure the necessary borrowed funds. Therefore, the question of *what type* of bond to use has frequently been less important than the question of *where* may the funds be borrowed. In keeping with the national trend, the Mississippi State government in the last decade has shifted to a large degree from full faith and credit (general obligation bond) debt[31] to non-guaranteed (revenue bond) debt.[32]

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[29] *Id.* An idea of what comprises other expenditures can be obtained from TAX FOUNDATION, INC., *supra* note 4, at 213.

[30] 1969 STATE FINANCES, *supra* note 1, at 40-41. All the percentage computations concerning the functional distribution of debt are by the authors from data contained in the above source.

[31] Full faith and credit debt is "long-term debt for which the credit of the state, implying the power of taxation, is unconditionally pledged." Full faith and credit debt is used interchangeably with general obligation debt in this study. *See* 1969 STATE FINANCES, *supra* note 1, at 53.

[32] Nonguaranteed debt is "long-term debt payable solely from pledged specific sources — e.g., from earnings of revenue producing activities. . .or from specific non-

General obligation bonds are backed by the full faith, credit, and taxing power of the state or local government. The promise to pay is unconditional and incontestible; this provides the investor with a margin of protection greater than he would have with a comparable nonguaranteed bond. Revenue bonds, on the other hand, are theoretically serviced from the revenue producing assets which they are used to purchase, but in reality are often dependent for principal and interest payments from earmarked taxes, certain other pledged charges or rents, or simply a grant from general revenues.[33]

Revenue bonds are used by the State government in Mississippi and other states for several reasons. They provide a means for those governments to circumvent debt barriers which establish ceilings on the amount of debt which can be issued; or, this type issue is used for projects that could not be financed by general obligation debt because of constitutional or statutory restriction. They may also be issued for the sake of political expediencey, since the full faith and credit of the State is not pledged to their service. The revenue bond protects the general taxpayer in case the project fails and in some circumstances, it might even bear a lower interest rate. Also, many people feel that some projects should be self-supporting, or that certain types of projects should be paid for by those who receive benefit from them.[34]

Revenue bonds, however, have several disadvantages. In some states they are issued by public authorities, which are creatures of the legislature, but which may possess a degree of self-determination.[35] This takes the management of the debt further from public control. In case there is a question of whether revenue bond debt is truly exempt from constitutional or statutory limitations, the State may be involved in costly litigation. Another often leveled criticism is that revenue obligations are often used to purchase assets or services which generate no revenue for the State. Also, even though the State is not legally liable for its revenue bond debt, it would probably service such debt in an economic depression in order to protect its fiscal integrity. Considering these disadvantages, it seems logical that the State government should use as much full faith and credit debt as possible, and resort to revenue

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property taxes." Revenue bonds are an important type of nonguaranteed debt; in the literature, these terms are frequently used interchangeably. Nonguaranteed debt is used interchangeably with revenue bond debt in this study. *Id.* at 57.

[33] *State and Local Government Debt, Part 1, supra* note 17, at 3.

[34] MOODY'S MANUAL, *supra* note 22, at a-25.

[35] An authority is "a corporate body created to serve a public purpose and empowered to issue revenue bonds to be serviced and secured by the income of that body." *See* HEINS, *supra* note 2, at 16.

bonds only when necessary. Such a policy would enable the State government to meet current and capital financial needs more effectively.[36] This criticism is not meant to imply, however, that revenue bonds are inappropriate debt instruments in every case; as noted above, they do possess definite advantages under certain circumstances.

Since revenue obligations are not backed by the taxing power of the State, courts have generally held that they are not subject to constitional or statutory limitations.[37] This qualification makes the promise to pay more highly conditional, forcing the investor to seek additional compensation to offset the extra risk of holding a nonguaranteed bond.[38] Therein lines the explanation for the interest rate differential between revenue bonds and general obligation bonds; investors prefer the greater security of guaranteed bonds to the lesser security of revenue obligations, other things being equal, and are therefore willing to accept a smaller interest rate on them.[39] This idea is developed more fully in Section III.

In 1969, State revenue bond debt in Mississippi amounted to $134,046,000; this amount represented 30.2 percent of the total gross long-term debt of $443,432,000.[40] In contrast, in 1969 full faith and credit issues in Mississippi amounted to $309,386,000, or 69.8 percent of the State's gross long-term debt.[41]

Gross long-term state debt outstanding for the eleven Southeastern states totaled $6,401,495,000 in 1969.[42] Full faith and credit bonds accounted for $1,875,197,000, or 29.3 percent of the total; $4,526,298,000, or 70.7 percent of the total, was held in the form of revenue bond debt.[43]

These figures reveal that in 1969 Mississippi's debt was composed of a significantly larger percentage of full faith and credit issues than was true for the eleven Southeastern states, on average; this means that

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[36] *State and Local Government Debt, Part 1, supra* note 17, at 5.

[37] HEINS, *supra* note 2, at 16; Tucson Transit Auth., Inc. v. Nelson, 485 P.2d 816 (Ariz. 1971); Arizona Highway Comm'n. v. Nelson, 459 P.2d 509 (Ariz. 1969); Mims v. McNair, 165 S.E.2d 355 (S.C. 1969).

[38] The large degree of investment risk associated with revenue bonds stems from the fact that if a project does not generate sufficient revenue to pay off the bonds, there is no other legal obligation on the part of the state.

[39] *State and Local Government Debt, Part 1, supra* note 17, at 5.

[40] 1969 STATE FINANCES, *supra* note 1, at 40. All the percentage computations, and the aggregate computations for the eleven Southeastern states combined, in the remainder of this section are by the authors.

[41] *Id.*

[42] *Id.*

[43] *Id.*

Mississippi had a smaller percentage of revenue bond debt than the "average" Southeastern state.

Five states in the regional group — Alabama, Arkansas, Georgia, Kentucky, and Virginia — had less than 25.0 percent of their debts in guaranteed debt.[44] Louisiana and South Carolina had between 45.0 and 60.0 percent of their debt in full faith and credit form in 1969.[45] North Carolina and Tennessee were the only states with more than 75.0 percent of their debt in guaranteed form.[46] Only one state in the region, Florida, had no full faith and credit debt outstanding in 1969.[47]

E. Service Requirements on the Mississippi Debt, 1967-1969

Biennial maturities of revenue bonds amounted to $11,503,000 in Mississippi in 1969, while maturities on full faith and credit bonds amounted to $18,238,000. Total maturity payments amounted to $29,741,000. Interest payments on revenue obligations amounted to $7,193,851.60 in 1969 and interest payments on full faith and credit bonds amounted to $21,244,978.57; total interest payments amounted to $28,438,830.17. Total debt service requirements (maturities plus interest payments) in the 1967-1969 biennium amounted to $58,179,830.17.[48]

F. Reasons for Mississippi's Small Percentage of Nonguaranteed Debt

Mississippi had a smaller percentage of its State debt in revenue bonds than did most of the other Southeastern states in 1969; also, the State had a much smaller percentage than the "average" state in the nation.[49] This situation may be due, at least in part, to the liberal full faith and credit debt limitations in the State.[50] The Mississippi Constitution provides that:

> Neither the State nor any of its direct agencies, excluding the political subdivisions and other local districts, shall incur a bonded indebtedness in excess of one and one half (1½) times

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] [1967-1969] MISS. TREAS. BIENNIAL REPORT, at 65-73. Service requirement figures on state debts are not presented on a disaggregative basis by the Department of Commerce; hence the use of figures from the State Treasurer's Report. The two sources disagree on the amount of revenue bonds outstanding. For a more complete explanation, *see* note 60, *infra.*

[49] 1969 STATE FINANCES, *supra* note 1, at 40. Percentage computations are by the authors from data contained in the above source.

[50] HEINS, *supra* note 2, at 29-35, discusses the effectiveness of the different types of constitutional debt restrictions in Mississippi and other states.

> the sum of all the revenue collected by it for all purposes during any one of the preceding four fiscal years, whichever year might be higher.[51]

In 1969, the total State general obligation debt was $309,386,000.[52] The total revenue for the same year was $783,010,000;[53] this was the largest amount of revenue generated during any of the four years of the period 1966-69. Consequently, the maximum constitutionally permissible debt in 1969 was $1,174,515,000 (783,010,000 times 1½). The permissible debt limit, therefore, was over three and one-half times the amount actually outstanding.

It is a credit to the State that its legislative representatives have resisted the temptation to incur debt up to the legal limit, and burden the taxpayers with huge annual debt service payments. On the other hand, the efficacy of issuing revenue bonds, *at higher interest costs*[54] when the State has constitutional authority to issue general obligation debt *at lower interest costs* must be questioned.

IV. INTEREST RATES PAID BY MISSISSIPPI ON THE TWO TYPES OF DEBT

In view of the fact that a large part of the Mississippi State debt is held in the form of revenue bonds rather than full faith and credit bonds, the question naturally arises as to the relative costs of these two types of debt to the State. The implications of any interest differential are very important. If a large difference between the interest rate paid on full faith and credit and revenue obligations exists, it follows that excessive interest is being paid on the debt.[55]

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[51] Miss. Const. art. 5, § 115 (as amended 1960). This amendment was approved by the electorate on November 9, 1960, and inserted in the State Constitution on November 23, 1969. *See also* MOODY'S MANUAL, *supra* note 22, at 1495.

[52] 1969 STATE FINANCES, *supra* note 1, at 40.

[53] *Id.* at 19.

[54] Previous studies have shown that in most cases revenue bonds earn a higher interest rate than general obligation bonds, other things being equal. HEINS, *supra* note 2, at 36-37, has presented the most complete exposition of the interest rate differential between guaranteed and revenue bonds in the several states. *See also,* J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 204 (1965). Maxwell says that the "interest rate on nonguaranteed bonds has been 0.5-0.6 percent higher than on full faith and credit bonds." Maxwell does not indicate, however, how he arrived at this particular figure. The Council of State Governments found the differential to be between 0.5 and 1.0 percent. *See* THE COUNCIL OF STATE GOVERNMENTS, PUBLIC AUTHORITIES IN THE STATES 72 (1953), cited in Simpson, Oklahoma's State Debt 318 (1959) (unpublished dissertation, Univ. of Oklahoma). Manuel Gottlieb also found that a differential existed between revenue and general obligation bonds. *See* Gottlieb, *The Revenue Bond and Public Debt,* 2 THE QUARTERLY REVIEW OF ECONOMICS AND BUSINESS, May 1962, at 38. Concurring with Gottlieb are the following four authors, all of which are cited by him. R. ROBINSON, POSTWAR MARKET FOR STATE AND LOCAL GOVERNMENT SECURITIES 17, 204 (1960); W. H. Tyler, *Revenue Bond Financing: Advantages and Disadvantages,* 32 MUNICIPAL FINANCE, Aug., 1959, at 76; W. DOWRIE AND D. FULLER, INVESTMENTS 391 (2d ed. 1950); and E. TROXEL, ECONOMICS OF PUBLIC UTILITIES 661 (1947).

Available evidence[56] indicates that the revenue bond earns a higher rate of interest than the general obligation bond when the two have comparable features, although it is difficult to prove that this differential exists, and even more difficult to show how great it is, since it is unusual for a state to issue full faith and credit bonds and revenue obligations of the same amount, type, length of life, etc., at the same time.[57] Upon *a priori* grounds, investors normally prefer a bond with greater security to one with lesser security, other things being equal. Therefore, logically, investors would normally prefer bonds guaranteed by the State's power to levy taxes on its wealth and income to the less secure revenue bonds, which are not backed by the full faith and credit of the State.[58] Several procedures have been designed to empirically demonstrate that a differential exists between the interest rate paid on revenue debt and the rate paid on full faith and credit debt. One such test, developed by Professor A. James Heins, is presented below, and is applied to the Mississippi State debt outstanding in 1969. This technique will be the basis for determining the interest costs the State of Mississippi incurred because of the heavy reliance on revenue bonds for financing debt.[59]

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[55] This topic receives excellent coverage in D. LYNCH, THE DEVELOPMENT OF STATE AND LOCAL DEBT IN KENTUCKY: *1890-1962,* at 71 (1966).

[56] *See supra* note 54, for such evidence.

[57] John L. O'Donnell, *The Tax Cost of Constitutional Debt Limitation in Indiana,* 15 NATIONAL TAX JOURNAL 410 (1962).

[58] Lynch, *supra* note 55, at 71.

[59] Through the use of a statistical technique known as multiple regression analysis, Professor Heins developed a model to determine the variables which control or affect significantly the magnitude of the interest rate which a state pays on its borrowed funds. Through this method, the impact on net interest cost resulting from the use of a certain type bond can be determined. Several variables are considered, and those which do not have a significant effect on the interest rate can be rejected from the analysis. The multiple regression model will be applied to the Mississippi debt at a later point in this paper to determine the magnitude of the extra interest burden that Mississippi bears due to revenue bond borrowing. To avoid confusing the uninitated reader with technical terms and discussion which may not interest him, certain technical material relevant to this discussion has been placed in an appendix to this paper.

Heins described the technique he used in his *Constitutional Restrictions Against State Debt, supra* note 2, at 36-38. Only one refinement was made to Heins' model in this paper. This change is discussed in footnote 6 of the appendix. Other authors

The Magnitude of Interest Costs

Application of equation (4), developed in the appendix of this paper, to the revenue bonds outstanding in Mississippi in 1969 will produce a reliable estimate of the additional interest the State will be paying throughout the life of those bonds relative to the interest required on bonds of the full faith and credit type. The sizes of various bond issues and the interest rate differential computations are shown in Table 1; an evaluation of the excess interest costs because of reliance on revenue bonds will be made from that data.

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have used Heins' basic model. *See, e.g.,* R. PORTER, FACTORS INFLUENCING THE COST OF STATE AND LOCAL BORROWING IN KENTUCKY 45-87 (1965).

The equation specified for the multiple regression model developed by Heins indicates that the interest cost of a state's nonguaranteed bonds (lr) is determined by the credit rating of the state (R), amount of issue (A), purpose of issue (P), call provisions (C), maturity of issue (M), general level of the interest rate (L), type of issuer (T), security for the issue (S), and types of bid (B). These variables were selected because of their availability, appropriateness, and because of their historical acceptance by economists as determinants of the interest rate. These determinants of the interest rate became the independent variables in an initial multiple regression equation in which the dependent variable was the nonguaranteed bond interest rate. The relationship between the dependent and independent variable can be shown symbolically in the following equation:

$$lr = f\ (R, A, P, S, C, B, M, L, T). \qquad (1)$$

This functional relationship says that the interest rate on nonguaranteed bonds (lr) is affected by the nine variables (R, A, P, S, C, B, M, L, T); these variables have been defined in the above discussion.

The equation specified for the guaranteed bonds was quite similar to the one for nonguaranteed bonds; in the case of guaranteed bonds, variables for type of issuer (T), security of the issue (S), and type of bid (B), were eliminated from the final equation for determining interest cost for guaranteed bonds. The type of issuer (T) was not included as a determinant in the full faith and credit equation because all such debt is backed by the state. Type of issue was considered in the equation for nonguaranteed bonds because the confidence of investors in the different type authorities may be reflected in the price they are willing to pay for nonguaranteed bonds. Inasmuch as the security of the state's revenue stands behind full faith and credit bonds, (lg) was not considered to be a function of the security offered to stockholders (S). Because almost every issue of full faith and credit bonds is offered at competitive bid, (lg) was not considered to be a function of the type of bid (B).

For full faith and credit bonds, the relationship between the independent and dependent variables is indicated by the following equation:

$$lg = f\ (R, A, P, C, M, L). \qquad (2)$$

This functional relationship says that the interest rate on guaranteed bonds (lg) is affected by the six variables (R, A, P, C, M, L); these variables have been previously defined. *See* HEINS, *supra* note 2, at 60-68, and Heins, *The Interest Rate Differential Between Revenue Bonds and General Obligations: A Regression Model,* 15 NATIONAL TAX JOURNAL, 399-405 (1962).

Table I
Estimated Additional Interest Costs From Revenue Bond Financing in Mississippi in 1969

Purpose for which Funds Used	Date of Issue	Bond Rating	Average Interest Rate on all Government Bonds[a] (Percent)	Amount Issued (Thousands)	Interest Cost of Similar General Obligation Bonds (Percent)	Average Interest Cost on Revenue Bonds[b] (Percent)	Added Annual Interest Payments	Added Payment Over Life of Issue
1	2	3	4	5	6	7	8	9
Port of Pascagoula	9-1-59	Aa	4.26	1,000	3.53606	4.0957	$ 5,596.406	$ 139,910.100
Highways	8-1-58	A	3.60	4,000	2.99817	3.5523	20,964.990	387,852.300
Highways	2-1-59	A	3.92	1,000	3.23692	3.7793	5,423.801	108,476.000
Highways	2-1-59	A	3.92	5,000	3.23692	3.8964	32,974.050	659,481.000
Highways	8-1-59	A	4.10	5,000	3.35327	3.9988	32,276.280	629,387.500
Highways	8-1-62	A	3.97	2,000	3.26442	3.3545	1,801.624	35,131.670
Highways	2-1-63	A	3.92	5,000	3.22357	3.0061	–10,873.460	–206,595.700
Highways	8-1-63	A	3.99	5,000	3.26474	3.2273	–1,871.966	–34,631.370
Highways	2-1-64	A	4.14	5,000	3.38729	3.3661	–1,059.485	–21,189.690
Highways	2-1-64	A	4.14	2,000	3.48019	3.2973	–3,657.780	–73,155.560
Highways	8-1-64	A	4.14	3,000	3.38729	3.3517	–1,067.705	–21,354.090
Highways	2-1-65	A	4.16	6,000	3.40096	3.3187	–4,935.551	–98,711.000
Highways	8-1-65	A	4.19	5,000	3.42146	3.4439	1,121.807	22,436.140
Highways	8-1-66	A	4.80	2,000	3.83840	4.6223	15,678.000	313,560.000
Highways	8-1-66	A	4.80	4,000	3.83840	4.6225	31,364.020	627,280.400
Highways	8-1-66	A	4.80	1,000	3.93130	4.5274	5,961.008	119,220.100
Highways	2-1-67	A	4.47	10,500	3.61284	4.1939	61,010.820	1,220,216.000
Highways	2-1-68	A	5.16	7,500	4.08446	5.0200	70,165.560	1,403,311.000
Highways	8-1-68	A	5.04	5,000	4.00244	4.4348	21,618.020	432,360.400
				79,000,000				
						Total	282,490.000	5,642,980.000

State of Mississippi, [1967-1969] Report of the State Treasurer 74-78; Moody's Manual, *supra* note 22, at 1495-1502. Various issues of Board of Governors of the Federal Reserve System, *Federal Reserve Bulletin;* and private correspondence with Miss Evelyn Gandy, State Treasurer of Mississippi.

[a] The average interest rate on all government bonds is taken to be the interest rate borne by long-term taxable U.S. government securities.

[b] The average interest cost of revenue bonds was provided by Miss Evelyn Gandy, State Treasurer of Mississippi.

The information presented in Table 1 is necessary to evaluate the extra interest paid by Mississippi because of heavy reliance on revenue bonds as a source of financing. While the table is rather straightforward, some explanation is required. All of the data required for a comparison of this type is not published; therefore, it was necessary to obtain additional information from the State Treasurer.

The Treasurer was only able to provide information for $79,000,000, or 56.66 percent of the total revenue bond debt outstanding of $139,429,000 in 1969.[60] A breakdown of the $79,000,000 of debt is presented in Table 1. The following discussion reveals how the partial figures "expanded" to reflect the total effect of the total debt.

Table 1, Column 8, shows that the average additional annual payments that the State of Mississippi will be required to pay on its revenue bond debt outstanding (for which information is available) amounted to $282,490 in 1969. This computation was made by computer by taking the differential interest rate between Column 6 and Column 7 and multiplying that amount by the amount of the bond issue. Restated, this computation reveals that on the basis of available 1969 data Mississippi paid $282,490 more in interest charges in that year than the State would have had to pay if full faith and credit bonds would have been issued instead of revenue bonds. This computation, however, clearly underestimates the true magnitude of that difference. Since the available data in Column 5 contained only 56.66 percent of the outstanding State revenue bond debt, approximately 43 percent of the debt is excluded. All attempts to obtain the balance of the data necessary to compute the difference in interest rates for all bonds outstanding were unsuccessful; therefore, it was decided that a satisfactory estimate could be made by expanding the calculated difference to the level it would reach if one logical assumption were true. That assumption is that the interest rate on the remaining $60,429,000 not included in Column 5 incurred interest costs at the same rate as the $79,000,000 for which data were available. When the necessary computations were completed the extra interest incurred is even more impressive than the $282,490 mentioned above. The total of Column 5 was increased to a level equal to 100 percent of the State debt outstanding in 1969 ($139,429,000); therefore, $60,429,000 was added. If the remaining $60,429,000 of the State's revenue bond debt had earned interest at the same rate, the average annual additional interest paid on the aggregate revenue bond debt would amount to *$498,570.*

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[60] The nonguaranteed debt figure presented here is not strictly comparable to the nonguaranteed figure presented earlier when comparisons were being drawn between Mississippi and the other Southeastern states. The figure used previously was taken from 1969 STATE FINANCES, *supra* note 1, at 40-41. The Bureau of the Census presents figures on a uniform basis for all fifty states, thus facilitating interstate comparisons of certain variables. The figure used here is taken from State of Mississippi, [1967-1969] MISS. TREAS. BIENNIAL REPORT at 72-78. The State Treasurer's data was selected at this juncture because only this source has the needed detailed information to "plug" into the multiple regression equations. In 1969, the Department of Commerce reported a revenue bonded indebtedness of $134,046,000; the State Treasurer reported a figure of $139,429,000.

Table 1 also shows that the additional interest payments over the entire life of the revenue bonds (for which information is available) outstanding in 1969 amounted to $5,642,980. Under the same assumption that the remaining $60,429,000 earned interest at the same rate as the $79,000,000 for which information is available, then the estimated total extra interest paid over the life of the issues amount to $9,959,372.

The above discussion dramatically illustrates the fact that revenue obligations carry higher interest rates than bonds for which the credit of the State is pledged, resulting in an increased debt burden on Mississippi. The next section of the paper discusses the importance of this finding for public policy purposes.

V. Conclusions and Public Policy Recommendations

From the foregoing it has been demonstrated that constitutional limitations in Mississippi do not impose ceilings on full faith and credit issues which are so low that they cause authorities to rely on revenue bonds for financing. This conclusion emerges from the fact that the outstanding full faith and credit debt in Mississippi in 1969 was substantially *under* the statutory ceiling. These results indicate that even though the ceiling is not approached, a substantial amount of Mississippi debt is in the form of revenue bonds.

Since revenue bonds were shown to bear a higher interest rate than full faith and credit issues, Mississippi is incurring higher interest costs because of its relying on nonguaranteed instruments. Since the debt ceiling apparently is not the critical factor causing the higher costs to be incurred, one can only assume that those in a position to affect decisions in such matters have reasons for relying on revenue bonds instead of full faith and credit issues. One important purpose of this paper was to discover whether the laws, as written, caused higher interest costs; if the law did impose debt ceilings which caused the use of revenue bonds (at a higher interest rate) instead of full faith and credit bonds (at a lower rate), the policy recommendation would have been that the legislature seriously consider raising or eliminating those ceilings to permit more reliance on full faith and credit issues to lower the interest costs to the State. Since the Constitution is not the culprit, the law need not be changed to effect significant economy in managing the State debt. Therefore, it is recommended that those who make decisions concerning what type of security to issue seriously consider the disadvantages of the higher interest costs of revenue bonds when they are inclined to use that type of security. To the extent that full faith and credit issues could be used instead, *substantial interest costs could be eliminated.* Such savings could release tax monies, used to pay the higher interest costs, for more worthy purposes such as health, education, and economic development.

Even if one takes the estimated savings mentioned above and divides the number by 2, reflecting only a 50 percent hypothetical diversion of revenue bond debt to full faith and credit debt, the savings are still substantial. Such an arbitrary adjustment would reduce the estimated annual savings mentioned above from $498,570 to $249,285 and the estimated savings over the life of the outstanding issues to almost 5 million dollars. If the amount of debt outstanding in Mississippi continues to increase, the magnitude of future savings would be even more impressive.

The above discussion does not intend to argue that 50 percent of the revenue bonds issued by the State should or could be full faith and credit issues. Instead, the results indicate that Mississippi is paying a higher interest cost whenever it uses a revenue bond when a full faith and credit issue would have been feasible. It appears reasonable, therefore, to suggest that the fiscal authorities in Mississippi reassess the bases on which they elect to use revenue bonds instead of full faith and credit issues. Perhaps even a greater diversion than the example given above would be possible.

APPENDIX

The text of the paper presents the essentials of the analysis of this study revealing the adverse cost impact whenever Mississippi uses revenue bonds wherever full faith and credit issues are feasible. Certain technical procedures were required to generate the data necessary to make the analysis; however, it was thought that some of the procedures may confuse the reader, or detract from the essential points of the paper. For this reason, technical explorations were avoided in the discussion within the text. However, since some readers may be interested in these technical aspects, the decision was made to include such information, but to present it in this appendix.

ESTIMATED REGRESSION EQUATIONS

To approach the analysis, the comparable full faith and credit bond interest rate must be estimated by a technique that allows any existing differential between types of bonds to be attributed to the nature of the revenue or full faith and credit bond rather than to the particular or unique features of a specific type bond. Influences of variables such as type of issuer, credit rating of issuer, amount of issue, purpose of issue, security of issue, etc., must be isolated. With the successful isolation of these factors, and given knowledge of the revenue bond interest rate, an estimate can be made of the interest cost which would have been required for a comparable full faith and credit bond.[1] The method employed to estimate the relative impact of each of these variables was multiple regression analysis.[2]

The final estimated regression equations are as follows:

$$1_G = .2472 + .1363\ X_{r_1} + .3613\ X_{r_2} - .0929\ X_c + .0267\ X_m + .6835\ X_L\ . \qquad (1)$$

$$1_r = .3038 + .2833\ X_{r_1} + .4237\ X_{r_2} + .6215\ X_{r_3} + .2709\ X_{p_1} + .3354\ X_{p_3} + .1263\ X_{s_2} + .0284\ X_m + .7272\ X_L\ . \qquad (2)$$

where:

1. X_r is Moody's Investors Service, Incorporated rating of the issue. This is an estimate of the financial capability of the issuer, discussed in Section II of this study. For general obli-

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[1] These are the same variables used in a similar study by A. James Heins. *See* Heins, *The Interest Rate Differential Between Revenue Bonds and General Obligations: A Regression Model,* 15 NATIONAL TAX JOURNAL 403 (1962). Hein's study included data from several states.

[2] As mentioned in the text of this paper, the approach used in this study, in the essentials, parallels that employed by Heins. *Id.*

gation bonds, Aaa rated bonds are represented by X_{ro}, Aa by X_{r1}, and A by X_{r2}; for revenue obligations, Aaa or Aa rated bonds are represented by X_{ro}, A by X_{r1}, Baa by X_{r2}, and unrated bonds by X_{r3};[3]

2. X_c is the call feature; 1 represents a callable bond, and 0 represents a noncallable bond;
3. X_m is the average maturity of the issue in years;
4. X_L is the index of the long-term bond interest rate: the Federal Reserve index of long-term government bond yields at the date of issue is the interest rate used;
5. X_p represents the purpose of issue: for general obligation bonds, X_{po} represents all purpose other than roads, utilities, and educational facilities, X_{p1} represents roads, X_{p2} represents utilities, and X_{p3} educational facilities; for revenue bonds, X_{po} represents all purposes other than toll roads and bridges, nontoll roads and bridges, utilities, and education facilities; X_{p1} represents toll roads, X_{p2} represents nontoll roads, X_{p3} represents utilities, and X_{p4} represents educational facilities;
6. X_{s2} represents the security for the issue when state rental revenues are used for that purpose.[4]

Significance of Variables

Several variables postulated to be important determinants of the interest rate in the original study proved to have no significant effect and hence were eliminated for the purposes of that study.[5] Among the variables rejected were the amount of issue and purposes of issue of full faith and credit bonds. Variables wielding no significant effect on the revenue debt interest rate were purpose of issue, other than for toll roads and utilities, legal status of issue (state or authority), call provisions and type of bid (negotiated or competitive). These variables were also excluded from this analysis.

The estimated multiple regression equation indicating the determinants of the revenue bond interest rate, (1) above, does not have a direct bearing on the problem at hand, and will be ignored. This equation could be used to yield the comparable revenue bond interest rate for a given full faith and credit bond interest rate; however, in the case of Mississippi debt, the objective was to estimate the potential comparable full faith and credit bond interest rate for a given nonguaranteed bond. To obtain a comparative interest rate for this study, relevant information concerning full faith and credit issues outstanding was "plugged into" equation (2) (the equation to determine the interest rate on full faith and credit issues). The results of the computation by computer yields the interest rate on these full faith and credit issues. This manipulation generates the data for Column 6. These figures in Column 6 were subtracted from those in Column 7 to obtain the differential rate. When the differential interest rate is applied to the amount of a given bond issue the result reflects the cost difference between revenue bonds and full faith and credit issues; this data is presented in Column 8.[6]

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[3] The assumption is made that general obligation bonds, since they are backed by the full faith and credit of the State, generally have a credit rating one notch above revenue bonds which have similar covenants and are issued under comparable economic conditions. This method of rating is justified on the basis that general obligations ratings have tended to be one notch higher than revenue bonds where states have issued both types of obligations. This procedure is consistent with that used by HEINS CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 51 (1963).

[4] *Id.* at 61. In the derivation of equations (1) and (2), the dummy variable approach was used to implement the following variables, which do not lend themselves to numerical measurement: T, R, P, S, C, and B. The same approach was used to determine the explanatory power of A, the amount of the issue, so that the bias of extreme observations on the regression would be avoided.

[5] *Id.* at 63-67.

Column 9, Table 1, is a projection of the annual interest differential over the life of the bond issue.[7]

Linear equations were used in this study to estimate the interest rate differential for two reasons: (1) Heins found such equations suitable for his study, which is highly regarded in the field of public finance, and (2) this study did not attempt to refine Heins' model; it was accepted as being a satisfactory technique for estimating interest cost differences without modification.

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[6] In several of the issues in Table 1, the estimated general obligation interest rate is greater than the interest cost of the revenue bonds with which they are compared. Two alternatives exist as to how to handle this situation. First, the assumption could be made that the negative difference is due to the nature of statistical estimation, and that such differences should not be considered in determining net interest savings since the State could have guaranteed the bonds and not paid the higher rate. Second, the assumption could be made that in certain instances revenue bonds might bear a lower interest rate than general obligation bonds, and that such negative interest differentials should be considered when computing the State's potential net interest savings. In this study, the authors chose the latter alternative as the best method of determining the possible savings which would accrue to the State if it were to use general obligation rather than revenue bonds. The latter alternative tends to bias the potential interest savings toward the conservative side. Heins chose the former alternative in his model. *Id.* at 51. This is the only point in the study where the authors did not adhere to Heins' model.

[7] It is possible that if the State were to move into general obligation bonds entirely that the general obligation interest rate would rise. There is no way of determining the precise magnitude of the increase, since it would depend on many imponderables, such as the willingness of revenue bond investors to accept lower rates, how many investors would switch to other types of securities, etc. Heins did not consider this a significant factor in his analysis. *Id.* at 55.

STUDENT COMMENTS

THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1971: AN ADEQUATE ANSWER TO MISSISSIPPI'S DRUG ABUSE PROBLEM?

I. INTRODUCTION: AN AWARENESS OF THE PROBLEM

On April 16, 1971, during the closing hours of the session, the Mississippi legislature adopted the Uniform Controlled Substances Act[1] to replace the Uniform Narcotic Drug Act of 1962[2] and the Barbituric Acid and Stimulant Control Act of 1962.[3] This new law is obviously a realization by the legislature that the problem of drug abuse is a dilemma that Mississippi must now attempt to combat and solve. We can no longer consider the problem to be foreign to our state.

Kenneth Fairley, Director of the Mississippi Bureau of Drug Enforcement has said that "Mississippi is on the verge of being overwhelmed with a narcotic and drug problem,"[4] and the figures show that this statement may be correct. Every county in Mississippi has asked for state aid in fighting drug abuse. In the past few years Mississippi health authorities have discovered the first known heroin addicts among our state's citizens. In Hinds County from 1964 to 1968 there were 27 persons arrested by the Jackson Police Department for narcotic and drug law violations of narcotic and drug laws. The Division of Law Enforcement Assistance, Office of the Governor, found that in 1971, 686 persons were arrested for violations of the narcotic and drug laws. The statistics compiled by the Law Enforcement Assistance Division came from Biloxi, Cleveland, Columbus, Greenville, Greenwood, Gulfport, Hattiesburg, Jackson, Meridian, Pascagoula, Starkville, Vicksburg, and West Point; and all but three of the above cities revealed over a 200 percent increase in narcotics arrests.[5] To illustrate the amount of illegal drugs in Mississippi, it can be noted that between October 1, 1971, and January 31, 1972, the Drug Enforcement Bureau seized or purchased over a quarter of a million dollars worth of illicit drugs.[6]

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[1] MISS. CODE ANN. §§ 6831-51 *et seq.* (Supp. 1971).

[2] Act of Mar. 1, 1962, ch. 397 [1962] GEN. LAWS MISS. 692 (repealed 1971).

[3] Act of Mar. 1, 1962, ch. 396 [1962] GEN. LAWS MISS. 686 (repealed 1971).

[4] Interview with Kenneth W. Fairley, Director of the Mississippi Bureau of Drug Enforcement, February 4, 1972.

[5] *Id.*

[6] K. FAIRLY, REPORT TO THE MISSISSIPPI COMMITTEE ON PUBLIC HEALTH, January 31, 1972.

Once the fact of drug abuse in Mississippi is established and accepted as a major problem, the inquiry should be whether or not the Uniform Controlled Substances Act adopted in Mississippi is a sufficient weapon with which to combat this challenge to today's society. This comment is an attempt to make such an inquiry. Its purpose is to provide the practitioner with a general background into the drug abuse problem by a discussion of several major areas: a history of governmental efforts in this field, an analysis of the major points of Mississippi's drug abuse law, judicial construction of such laws, the debate over the proper classification of the controlled substances, and a look at the penal provision of the new law.

More importantly, however, the authors hope that this comment will give its readers some factual basis upon which to both appreciate the need for action and form an opinion concerning this uncharted and often ill-defined area of the law. Viewpoints often differ about the approach to solving the problem. One opinion may be critical of the way in which the law has handled drug abuse:

> It has become increasingly apparent that the law has failed to offer a constructive means of dealing with the many problems of drug abuse. Rather, the law seems only to have succeeded in alienating thousands of young people and in making a mockery out of an entire segment of our system of criminal justice. Arbitrary enforcement of harsh and often senseless legislation has resulted in the branding of thousands of young people as felons, while a critical void continues to exist in the field of education and in other preventive measures.[7]

Or another opinion may state that the law should adopt and keep a strong stand against the abuse of narcotics:

> We may or may not agree that mere drug abuse is bad *per se*. But, when the habitual use of certain drugs happens to be detrimental to the well-being of both the individual and society, it must be regarded as a pernicious vice and proscribed by law. . . . [It] would be highly undesirable for society to adopt a permissive attitude toward a deleterious practice.[8]

Even though a disparity of feelings exists in choosing the best manner in which to assault the drug abuse dilemma, the goal of finding an effective method of dealing with this multi-faceted problem must nevertheless be reached. Until a better answer is found, whatever approach a state adopts must be used as best it can and supported by all concerned, realizing, of course, that the law must keep pace with and adapt to the changing needs of society and the rapidly expanding research and knowledge in the area.

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[7] Chayet, *Legal Aspects of Drug Abuse,* 3 Suffolk U. L. Rev. 1 (1968).

[8] Miller, *Marijuana: The Law and Its Enforcement,* 3 Suffolk U. L. Rev. 81-82 (1968).

II. THE HISTORICAL DEVELOPMENT OF GOVERNMENTAL EFFORTS TO CONTROL DRUG ABUSE

Prior to the advent of the twentieth century there existed in the United States few if any legally imposed regulations or restrictions upon the possession, sale, or use of what today are considered dangerous drugs and narcotics. Indeed, one needed no prescription to purchase any type of drug, including the opiates. Narcotics were widely used and accepted by all classes of society without the attachment of moral stigma or legal consequence.[9] Measured per capita during the period encompassing the years 1865 to 1900, addiction to narcotics within the United States was approximately eight times greater than it is today.[10]

A. Early Mississippi Legislation

1. The regulation and control of narcotics

Mississippi's initial legislative effort to regulate and control the trafficking and use of drugs occurred in 1886. Legislation which prescribed the manner of selling preparations containing morphine,[11] was approved on March 18, 1886. The statute did not go so far as to limit the authority of a druggist to dispense preparations of morphine without the presentation of a prescription issued by a physician, however. It provided only that the dispensing of a drug preparation containing morphine was unlawful ". . . unless same [should] be wrapped in a scarlet paper or envelope, and all bottles or vials [containing a morphine preparation] . . . have . . . a *scarlet* label, lettered in white letters, plainly naming the contents of said bottle."[12]

Violation of the provisions of this act was deemed a misdemeanor, and upon conviction the offender was susceptible to a fine of not less than ten dollars nor more than fifty dollars at the discretion of the court for each separate and distinct violation. The act made no provision for imprisonment.

Although the legislation was less than comprehensive, an act to regulate any medicinal preparation two decades prior to the turn of the century was progressive legislation. Prior to 1897 no significant legislation in any state had yet been enacted to regulate the manuafcture or distribution of narcotics.[13]

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[9] T. DUSTER, THE LEGISLATION OF MORALITY 3 (1970).

[10] *Id.* at 8.

[11] Act of Mar. 18, 1886, ch. 29 [1886] GEN. LAWS MISS. 87.

[12] *Id.*

[13] T. DUSTER, *supra* note 9, at 12. *See also* M. NYSWANDER, THE DRUG ADDICT AS A PATIENT 1-13 (1956).

On February 5, 1900, Mississippi broadened its classification of regulated substances to include cocaine by enacting legislation to regulate its distribution by sale or gift.[14] Although the derivatives of cocaine were not regulated by the enactment, the legislation did provide the potential for greater control and supervision of cocaine than was afforded morphine preparations by the act of 1886. The cocaine act prohibited the dispensing by either sale or gift of any quantity of cocaine, unless the drug was to be dispensed directly to a lawfully licensed physician or dentist or upon the prescription of such physician. Although prescriptions could be legitimately filled only once, the act stated specifically that it should not be construed to interfere with the medicinal use of cocaine by physicians or dentists in their practice.

Upon conviction for violation of the act, a penalty consisting of a fine to be not less than ten dollars nor more than five hundred dollars, a term of imprisonment in the county jail for not less than one month nor more than six months, or both.

The penalties set out in both early Mississippi acts seem unusually lenient and without probable deterrent effect compared to the standard prescribed by deterrent penalties imposed upon acts of unauthorized possession or sale of either of the regulated substances in later statutes.[15] But knowledge of the patterns of potential addiction to various drugs was only beginning to develop. In 1898 a derivative of morphine known as heroin had been enthusiastically received by the national medical community as a major advancement in analgesic research.[16] At that date only a small segment of the medical profession recognized that the unregulated dispensing of narcotics for treating a myriad of medical problems possessed potentially harmful consequences.[17] This segment of the medical profession proved instrumental, however, in procuring recognition of the potential problems and intervention through regulation by the governments of the several states.

By 1910 the Mississippi legislature had seemingly been made aware of the likelihood of cocaine abuse. During the 1910 legislative session the penal imprisonment of the prior cocaine legislation was sharply increased from maximum confinement in the county jail for not more than six months to minimum confinement in the state penetentiary for not less than one year. The maximum period of confinement for unlawful delivery of cocaine was increased to ten years.[18]

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[14] Act of Feb. 5, 1900, ch. 107 [1900] GEN. LAWS MISS. 145.

[15] The penalty for simple possession of morphine in its derivatives under the Uniform Narcotic Drug Act, the statute in force prior to the adoption of the Uniform Controlled Substances Act was not less than two nor more than five years' imprisonment, or a two thousand dollar fine, or both. For cocaine derivatives the penalties were equally harsh. Act of Mar. 1, 1962, ch. 397, § 5 [1962] GEN. LAWS MISS. 695 (repealed 1971).

[16] *See* M. NYSWANDER, *supra* note 13, at 1-13.

[17] *Id.*

The Mississippi legislature moved again during the 1914 session, enacting legislation which made more difficult the unlawful trafficking in cocaine by providing that "there [was] no property in any cocaine kept or offered for sale in violation of the law, or in any of the vessels or appliances used in connection there-with."[19] The act further provided what might be considered the first penalty for mere possession. The fact that any person not authorized by law to sell or purchase cocaine was found to have the drug or appliances adapted to its sale in his possession was made presumptive evidence that he in whose possession the cocaine or appliances were found was engaged in keeping them for the purpose of sale.[20] Thus the burden of proving an unlawful transfer of cocaine, which had been placed upon the state's prosecutors, was negated. The legislation placed the burden instead upon the accused to rebut the presumption that he was keeping the cocaine for sale. Failure to adequately rebut the presumption, regardless of the actual circumstances surrounding possession by the accused, left him confronted by fine, imprisonment, or both penalties.

In 1924 the classification of regulated drugs was expanded to include not only cocaine but also "opium, morphine or their derivatives or compounds in any quantity whatever."[21] The act continued to limit to regularly licensed physicians, dentists or persons holding prescriptions from such physicians the sale or gift of the listed drugs. The limitation placed upon refilling once-filled prescriptions also remained, as did the expression that the act should not be construed to interfere with the use of the regulated substances by physicans or dentists in their practice.

Although the legislation regulated certain heretofore unregulated dangerous narcotics by making a prescription necessary to obtain them, it did not completely preclude the dispensation of preparations containing narcotic substances. The provisions of the act were "not [to] be construed to apply to the sale, distribution, giving away, dispensing or possession of preparations and remedies which [did] not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semi-solid preparation, in one avoirdupoise ounce."[22] The legislation made the provision, however, with reference to these exceptions that "such remedies and preparations [had to be] sold, distributed, given away, dispensed or possessed as medicines and not for the purpose of evading the intentions and provisions of this act."[23]

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[18] Act of Mar. 21, 1910, ch. 186 [1910] GEN. LAWS MISS. 194 (Amended 1924).

[19] Act of Mar. 14, 1914, ch. 144 [1914] GEN. LAWS MISS. 186.

[20] *Id.*

[21] Act of Apr. 10, 1924, ch. 248 [1924] GEN. LAWS MISS. 347.

The penalties imposed upon persons convicted of violating the provisions of the 1924 act were carried forward from the act of 1910, which had increased the term of confinement from a discretionary period of one to six months to a minimum confinement of one year and a maximum confinement not to exceed ten years. The legislation in itself did not provide for monetary sanctions.

Clearly Mississippi was late in enacting legislation to control the use and abuse of many dangerous narcotics, although it had taken extremely limited regulatory action concerning morphine quite early. Between 1887 and 1908 almost all states enacted statutes aimed primarily at curbing in some manner the distribution of narcotics.[24] In 1904 the New York legislature enacted the first comprehensive act relating to the problem of narcotics abuse.[25] However, the lack of uniformity of the statutory regulations promulgated by the states soon precipitated intervention by the federal government. Congress enacted comprehensive national legislation in the form of the Harrison Anti-Narcotic Act on December 17, 1914.[26]

Although no conclusive premise exists to explain Mississippi's late entry into the field of control and regulation of narcotics abuse, the fact that the state and its people during the early decades of this century were basically agrarian and to a large extent self reliant, coupled with the general lack of societal anxiety concerning the dangers of abuse and addiction produced by broadscale narcotics use, compels the conclusion that neither narcotics use or addiction was a significant problem of the day in Mississippi.[27]

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[22] *Id.*

[23] *Id.*

[24] T. Duster, *supra* note 9, at 13.

[25] *Id.*

[26] Act of Dec. 17, 1914, ch. 1, 38 Stat 785. (found in scattered sections of 26 U. S. C.).

[27] Prior to 1971 Mississippi state health officials had reported treating heroin addicts at the facilities in Jackson, Mississippi. During 1971 fifteen cases of heroin addiction were reported and treated. Interview with Kenneth W. Fairley, Director of the Mississippi Bureau of Drug Enforcement, February 4, 1972.

2. *The Regulation and Control of Marijuana*

Indian hemp, widely cultivated commercially as one of the earliest crops in the American Colonies,[28] had been manufactured into rope, twine and textiles throughout the United States for one hundred and fifty years before use in its more exotic form, marijuana, was proscribed by legislation in Mississippi. In 1930 the legislation made it unlawful "for any person or corporation to sell, barter, give away, or keep for sale in this State, cigarettes, cigars, or tobacco . . . in which there [was] a mixture or compound of the drug Cannabis Indica, commonly known as Mari Juana."[29]

The prohibition which the statute placed upon the transfer of cannabis indica was absolute. Unlike the prior narcotics regulations, there was no provision in the act which authorized dispensing to or upon the order of a health professional. Persuasive authority indicates that the apparent disparity was justified upon the basis that marijuana failed to possess known theraputic qualities,[30] while concurrently the fact that it is not addicting was not readily appreciated by the medical or legal community.[31] In fact, during the same period "the Federal Bureau of Narcotics was condemning the use for pleasurable purposes of the dried crumpled stems, leaves and seed pods of Indian hemp,"[32] through very intense views expressed by the Commissioner of the Bureau.[33] No doubt the influence of Bureau rhetoric went throughout all states and was expressed in state legislation.

Those persons violating the act were deemed guilty of a misdemeanor, and upon conviction they were subject to penalties including a fine not exceeding one hundred dollars, imprisonment in the county jail not exceeding sixty days, or both fine and imprisonment. The imposition of the penal sanctions were placed within the sound discretion of the trial court.

Although Chapter 13 of the Laws of 1930 had made unlawful the *sale, bartering, gift or keeping for sale* of commodities intended for smoking in which there was contained a mixture or compound of the drug commonly known as marijuana, the legislation provided no overt penal sanction for simple possession.[34] In 1934, however, legislation repealing the 1930 statute[35] and clearly manifesting a criminal sanction for simple possession was enacted. At the same time the new act licensed lawful possession by certain designated classses of individuals and professions on a basis quite similar to the narcotic control legislation of the previous two decades. The statute made unlawful the possession of marijuana by one "other than a regularly licensed druggist or apothecary"[36] except possession gained through the transfer by druggists to regularly licensed physicians or upon prescription of such physicians. In no instance was the prescription to be refilled by the druggist. Possession by one not authorized by the act to purchase, sell, or keep for sale any mixture or compound containing cannabis indica was legislatively determined to be presumptive evidence that that individual was keeping the marijuana for the purpose of sale.

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[28] Hoff, *Drug Abuse,* 51 MIL. L. REV. 181 (1971).

[29] Act of Feb. 27, 1930, ch. 13, § 1 [1930] GEN. LAWS MISS. 13.

[30] Hoff, *supra* note 28, at 181.

[31] *Id.* at 183.

[32] *Id.*

[33] *Id.* at 184. According to the view expressed by the Commissioner: "It undermines its victims and degrades them mentally, morally, and physically. There is complete unpredictability with effects that may range from intense intoxication, having fits, criminal assaults, and stupefaction." *Id.*

Violators were held to be guilty of a misdemeanor, which was punishable upon conviction by fine and internment in the county jail. The fine could be no less than fifty dollars nor no more than five hundred dollars, and the period of imprisonment could vary from one to six months.

The two fundamental changes from the 1930 act evidenced in the 1934 act, that of making unauthorized possession unlawful and that authorizing limited possession and dispensation by the pharmaco-medical community, appear to be antagonistic to one another. While the absolute limitation against unauthorized possession supports the theory submitted as a possible basis of the 1930 enactment, the grant of authority to physicians to prescribe marijuana obviously presumed that the drug possessed some theraputic virtues.

B. The First Comprehensive Legislation

In 1936, Mississippi enacted the Uniform Narcotic Drug Act.[37] The act approached this state's need for internal regulation of narcotics use in a comprehensive fivefold manner. The legislation emphasized that it was "unlawful for any person to manufacture, possess, have under his or her control, sell, prescribe, administer, dispense, or compound any narcotic drug except as authorized."[38] Every person or association manufacturing any compound or preparation containing a restricted amount of a regulated narcotic substance was required to register and obtain a license from the State Board of Pharmacy. However, the provisions for licensing those dealing in narcotics did not apply to the use and administration of the drugs by registered physicians, dentists, or veternarians in the course of their professional conduct of preparing or dispensing the drugs for legitimate medical purposes. Prior to the issuance of the license, every applicant had to qualify by meeting prescribed standards, which included a showing of good moral character and a record disclosing no conviction for a willful violation of any state or federal narcotics law.

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[34] Act of Feb. 27, 1930, ch. 13, § 1 [1930] Gen. Laws Miss. 13.

[35] Act of Feb. 26, 1934, ch. 339 [1934] Gen. Laws Miss. 623.

[36] *Id.*

[37] Act of Mar. 16, 1936, ch. 289 [1936] Gen. Laws Miss. 553.

[38] *Id.* The Act defined narcotic drugs to include "coca leaves, opium, cannabis, and every substance neither chemically nor physically distinguishable from them." There-

Further, limitations were placed upon the sale and distribution of narcotics by duly licensed manufacturers and wholesalers. The limitations restricted the transfer of narcotics to designated classes of medical or scientific professionals and, on special written orders accompanied by certificates of exemption as required by the federal narcotics laws, to persons in the employ of governmental subdivisions receiving or dispensing narcotics by reason of their official duties. In all instances official written orders were made necessary to obtain the transfer of narcotics. The act specifically exempted from its provisions restricting possession or control all common carriers or warehousemen and their employees acting in the scope of their employment, while actually engaged in lawfully transporting or storing narcotic drugs.

In almost every instance in which narcotics were transferred, both the transferor and the transferee were required to make a record evidencing the transfer and to retain a copy of this record for a period of two years. The only exceptions which existed to the necessity of close recordation related to the transfer of "narcotic drugs . . . professionally used in the treatment of any one patient, when the amount . . . [did] not exceed in any forty-eight (48) consecutive hours, (a) four grains of opium, or (b) two grains of codeine or any of its salts, (c) one-half of a grain of morphine, or any of its salts or (d) one-fourth of a grain of heroin

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fore after 1936 the legal consequences stemming from the unlawful possession or distribution of an illicit drug in Mississippi, whether that drug was marijuana or morphine, was the same.

The Act defined cannabis to include "(a) the dried flowery or fruity tops of pistillate plant Cannabis Sativa L., from which the resin had not been extracted. . . ." However this definition was judicially expanded in 1937 when the Supreme Court construed the term "includes" to be less restrictive than the term "means," thereby finding a basis to uphold the conviction of an individual possessing a growing plant of marijuana in his backyard. The Court, in its decision, acknowledged its responsibility to strictly construe penal statutes. Harris v. State, 179 Miss. 38, 175 So. 342 (1937).

(sic) or any of its salts, or (e) a quantity of any other narcotic drug or any combination of narcotic drugs that [did] not exceed in pharmacologic potency of any of the drugs named above in the quantity stated."[39] The type of record required by the legislation was not outlined in the statute. Instead the State Board of Pharmacy was empowered to draft regulations relating to records, which in its discretion would best serve the purposes intended. To further its enforcement, this Board was also provided with ready access to the records of individual drug dealers by the provisions of the act.

The limitation placed upon dispensing narcotics by prescription, instituted in Mississippi by earlier legislation,[40] remained as one of the five fundamental regulatory techniques of the uniform act. The legislation provided that a physician had to prescribe, administer or dispense narcotics in good faith and then only when such action would be "in the course of his professional practice."[41]

In a series of decisions construing certain language appearing in the federal statute regulating the prescription of narcotic drugs which was identical to that of the Mississippi act, the physicians of Mississippi, as well as those from other parts of the United States, had been placed on notice to judiciously prescribe such substances or be subjected to harsh penal measures. In historic *Webb v. United States*,[42] the United States Supreme Court determined that a prescription for narcotics administered to an addict "not in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use"[43] did not constitute a prescription as that term was intended to be construed by the framers of the act. The *Webb* decision was followed closely by other decisions which further limited the immunity afforded by the federal act to physicians rendering medical services.

In *Jin Fuey Moy v. United States*[44] the Court construed the expression "in the course of his professional practice only" to preclude a physician from legitimately prescribing a narcotic to an addict for the single purpose of catering to his appetite or satisfying his craving. Other federal decisions[45] further construed the legislation in a manner resulting in the medical profession's treatment of addicts only on a most personal and individual basis, if at all, before the United States Supreme Court finally recognized that addiction was a disease subject to proper medical treatment including relief of its conditions of addiction.[46]

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[39] Act of Mar. 16, 1936, ch. 289, § 10 [1936] GEN. LAWS MISS. 558.

[40] Act of Feb. 5, 1900, ch. 107 [1900] GEN. LAWS MISS. 145.

[41] Act of Mar. 16, 1936, ch. 289, § 8 [1936] GEN. LAWS MISS. 556.

[42] 249 U.S. 96 (1918).

[43] *Id.* at 99.

[44] 254 U.S. 189 (1920).

But the prescription provisions, like the provisions relating to the keeping of records, did not apply to every compound or preparation which contained a narcotic. So long as the narcotic contained in the prepared medication did not exceed certain specific limitations, the compound was not subject to the controls of the act. Every individual in the position of dispensing, prescribing, or administering a narcotic preparation exempted from the application of the act was placed under a duty in administering such compounds to use reasonable diligence to ascertain whether "such administering . . . [would] provide the person to whom or for whose use . . . such preparations [was] prescribed . . . within forty-eight (48) consecutive hours, with more than four grains of opium or more than one-half grain morphine or of any of its salts, or more than two grains of codeine or any of its salts, or more than one-quarter of a grain of heroin or any of its salts".[47] If such individual through reasonable diligence discovered that the person to whom the compound was to be administered would be provided with a prescribed amount of exempt narcotics within the stated period, he was prohibited from dispensing the compound. This limitation was inapplicable to physicians, attempting in good faith in the course of their professional practice to alleviate the suffering of patients afflicted with disease, when such suffering could be alleviated by the administration of narcotics in greater quantities than those specified in the exemption.

The uniform act also incorporated as a method of control the requirement that to every package prepared for transfer the transferor had to securely affix a label on which designated information was shown. In the instance when a label was affixed by a manufacturer or wholesaler, no person except an apothecary, and then only in the course of his professional conduct, could lawfully alter, deface, or remove the label. Once a narcotic reached the hands of the consumer-patient, possession was lawful only if the drug remained in the container in which it was delivered until its use.

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[45] *See* United States v. Behrman, 258 U.S. 280 (1920) which construed an indictment purposely drawn whereby it failed to allege that the physician wittingly prescribed narcotics not in the course of an attempted cure as valid. The decision made clear that the question of a physician's good faith and adherence to fair medical standards was not requisite for conviction under the statute.

[46] *See* Linder v. United States, 268 U.S. 5 (1925).

[47] Act of Mar. 16, 1936, ch. 289, § 9 [1936] GEN. LAWS MISS. 557.

Finally, the enactment approached the addiction problem by prescribing commitment for one adjudged to be an habitual user of habit forming drugs. Such proceedings were instituted by affidavit duly verified by a person claiming to have knowledge of the addiction of another, such fact being set forth in the affidavit. Upon the affidavit being filed with the district attorney and proper notice of the charge being given to the accused, the judge of any court of competent jurisdiction heard "the evidence presented and [appointed] a commission of two physicians . . . [to] examine such person and certify to the court as to whether such person [was] a (sic) habitual user of habit forming drugs as contemplated"[48] in the act.

Upon being satisfied that all the allegations of the affidavit were true, the judge made and filed an order compelling the adjudged addict to submit to and continue treatment for his addiction at a private institution with medical supervision of his choosing approved by the State Board of Pharmacy. If the addict was unable to afford private treatment, then the legislation provided that he should be committed for treatment to a hospital or institution owned by the United States and at the expense of the United States.

In the event that the evidence of addiction at the hearing failed to satisfy the presiding judicial officer as to the habitual use of habit forming drugs by the accused, the judge was empowered to order his commitment for a period not exceeding thirty days in order to obtain further evidence needed to render a decision in the case.

The portion of the act permitting judicial commitments of addicts was specifically "designed to rehabilitate them and restore them to mental and physical health."[49] To further the stated purpose of restoring addicts to mental and physical health, the statute placed within the sound discretion of the trial court, in the instance of criminal proceedings, the authority to stay such proceedings or defer the imposition of sentence and commit the defendent to a rehabilitative public hospital, when it appeared that he habitually used narcotic drugs. However, the language of the act did not go so far as to commute the criminal action. Upon the defendant's discharge from treatment, once again he became subject to criminal prosecution.

The act also vested trial courts with the authority to commit to state hospitals upon proper medical recommendation those persons who voluntarily made application for the treatment of drug addiction. Any person voluntarily committed could not be detained under the voluntary agreement for more than ten days after he notified the hospital or institution of his intention to leave.

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[48] *Id.* § 18.

[49] *Id.* § 18 (b).

Obtaining compounds or preparations containing a regulated amount of narcotics by procedures differing from those outlined in the act for any purpose other than the use, sale, or distribution in the conduct of a lawful business in such drugs or in the course of legitimate medical treatment was unlawful. Penalties set out in the act for its violation included a fine not to exceed five thousand dollars, a term of imprisonment not to exceed five years, or both. For any subsequent offense the maximum amount of the fine was increased to ten thousand dollars and the maximum term of imprisonment was increased to ten years. The penal provisions of the legislation did not differentiate between possession for personal use in violation of the act and possession of narcotics for the purpose of trafficking in the drug. Obviously the legislation was not geared primarily toward stopping drug abuse by punishing the abuse of narcotics, but the fact remains equally clear that its thrust was not solely in the direction of recognition of abuse problems and attempted rehabilitation.

Further, upon the conviction of any health professional, manufacturer or wholesaler for the violation of a provision of the act, the board or officer by whom the convicted defendant had been licensed to practice his profession or to carry on his business was empowered in its discretion to suspend or revoke his license or registration. The burden of proving that the alleged violation was covered by an exception proviso or exemption was placed upon the one accused of violating the act.

Legislation enacted in 1940 made unlawful the unauthorized sale, distribution, or possession within the state of Mississippi of medicine containing any quantity of barbituric acid.[50] With one exception,[51] one was authorized to possess or trade in barbituric acid only when in possession of a lawful prescription by a medical professional "possessing a current federal narcotic license"[52] or as a wholesaler or manufacturer selling such preparations to a licensed dealer in drugs. As in the case of similar legislation restricting the sale of narcotic drugs, apothecaries were statutorily prohibited from refilling prescriptions for medicines containing barbituric acid.

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[50] Act of Mar. 20, 1940, ch. 297 [1940] GEN. LAWS MISS. 532.

[51] *Id.* ". . . [N]othing in this . . . act shall restrict or prevent the sale of patent or common medicines handled and sold by stores and commissaries, which medicines have been prepared . . . for the exclusive use in the treatment of sick mules . . . or other such animals." *Id.*

[52] *Id.*

The enactment imposed a duty upon every circuit judge in the state to call to the attention of every grand jury assembled "the evil effects of barbituric acid."[53] It also placed a duty of enforcement upon every law enforcement officer, physician, pharmacist, dentist, and veternarian within the state.

One charged and convicted of violating the provisions of the act was deemed to be guilty of a misdemeanor and subject to the penalties provided by law for such offenses.

After the 1940 enactment only minor changes[54] occurred in the Mississippi law controlling drug abuse until 1952. In that year the penalty for the sale of barbituric acid without a lawful written prescription having been presented was increased and differentiated, and the severity of the penality imposed upon conviction for violation turned on whether the act was committed against a minor or an adult.[55] A violation of the act which consisted of selling barbituric acid to a minor, followed by conviction, carried a minmum term in the penitentiary of one year. If the person against whom the offense was committed was an adult, conviction carried a fine of not less than fifty dollars, nor more than five hundred dollars, or internment in the county jail for not less than ten days nor more than six months, or both such fine and imprisonment.

In 1952 marijuana once again came under the scrutiny of the legislature, and as a result greater penalties were imposed for its unlawful sale or possession.[56] Whereas the act of 1934 made violation of its provisions punishable as a misdemeanor, legislation emanating from the 1952 session provided that marijuana violations should be punishable as a felony. The legislation, just as that passed at the same session relating to barbituric acid, differentiated as to the severity of the penality imposed upon the basis of whether the offense was perpetrated against a minor or an adult. Further, the penal sanctions of the act became harsher for subsequent offenses.

In the instance of sale or distribution of marijuana to a minor, upon conviction for the violation as a first offense, minimum punishment was established as a fine of not less than five thousand dollars and imprisonment for not less than five years. Subsequent offenses were punishable by fines not to be less than ten thousand dollars and terms of imprisonment not to be less than ten years. The maximum penal sanctions which could be meted out by the trial court were increased to ten thousand dollars in fine and ten years imprisonment for a first offense and twenty-five thousand dollars in fine and twenty years imprisonment for each subsequent offense.

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[53] *Id.*

[54] The Uniform Narcotic Drug Act, enacted in 1936, was amended in 1944 to include and define isonipecaine. Ch. 271 [1944] GEN. LAWS MISS. 477.

[55] Act of Apr. 12, 1952, ch. 256 [1952] GEN. LAWS MISS. 287.

[56] Act of Apr. 14, 1952, ch. 261 [1952] GEN. LAWS MISS. 289.

Violation of the act, when prosecuted as a first offense violation committed against an adult, was punishable upon conviction by a fine not to exceed five thousand dollars *or* by imprisonment in the penitentiary for a term not exceeding five years *or* both such fine and imprisonment. For any subsequent offense a doubling of the maximum fine and imprisonment was authorized.

The amendment further served to clarify that possession of marijuana and narcotics as defined in the act, was unlawful and, in itself, constituted presumptive evidence that such possession was for the purpose of illegally trading in the substance in violation of the statute. Finally, it broadened the definition of cannabis to correspond to the announced judicial construction of the term as used in a previous enactment[57] that "all parts of the plant . . . whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant"[58] was that which the legislation was enacted to regulate. The only limitation placed upon the possession, use, or sale of cannabis by its definition was that the term was not to include the mature stalks of the plant or the fiber produced from such stalks.

In 1960 legislation was enacted which broadened the scope of the drug regulations in regard to the substances defined as narcotic drugs.[59] The act inadvertently changed the function of classifying new narcotic drugs from the State Board of Pharmacy to the State Board of Health.[60] This error was rectified by subsequent legislation, however, which reinvested the State Board of Pharmacy with the power to classify new substances as narcotic drugs.[61]

Again the penalties for violation of the act were increased.[62] When the violation proved to be the second or subsequent offense of any provision of the Mississippi act or when the offender had been previously convicted for violation of the laws of the United States or of any other state relating to narcotic drugs or marijuana, a minimum fine and term of imprisonment was made mandatory. Second offenders were to be fined three thousand dollars and imprisonment for not less than five years, while third or subsequent offenders were to be fined not less than five thousand dollars and imprisonment for not less than ten years. Providing a narcotic or amphetamine to one eighteen years of age or younger was punishable by fine not to exceed ten thousand dollars or imprisonment in the peniteritary for a term of not more than thirty years, or both.

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[57] *See* Act of Feb. 27, 1930, ch. 13, § 1 [1930] GEN. LAWS MISS. 13.

[58] Act of Apr. 14, 1952, ch. 261, § 4 [1952] GEN. LAWS MISS. 292.

[59] Act of May 11, 1960, ch. 348, § 1 [1960] GEN. LAWS MISS. 520.

[60] *Id.* § 2

[61] Act of Mar. 1, 1962, ch. 397 [1962] GEN. LAWS MISS. 692 (repealed 1971).

[62] Act of May 11, 1960, ch. 348, § 3 [1960] GEN. LAWS MISS. 523.

By the decade succeeding 1950, the hysteria of the drug abuse phenomenon had begun to sweep the United States, and that hysteria, not actual abuse, was the root of much legislation in Mississippi. The statutory enactments of this state's legislature, which increased the regulatory aspects as well as the penal sanctions of the narcotic laws, closely adhered to the pronouncements on the subject by the regulatory agencies of the federal government. However, the problem spoken to by the pronouncements of the federal government was not as foreign to sister states of a more urban composition as it was to the rural south. The legislation presented a timely attempt to prevent the spread of drug abuse to this state rather than an attempt to cure an exising infirmity.

C. The Comprehensive Legislation of 1962

1. *Barbituric Acid and Stimulant Control Act*

Although legislation was enacted during the 1940 session of the Mississippi legislature to regulate the distribution and use of compounds containing barbituric acid[63] and legislation was enacted in the 1952 legislative session to impose greater penalties for the violation of this act,[64] not until 1962 was a statute enacted which regulated the use and distribution of barbiturates and stimulants in a comprehensive manner.[65] The Barbituric Acid and Stimulant Control Act prohibited the delivery of any barbituate or stimulant unless is was delivered in the manner outlined by the act.[66] A pharmacist upon the prescription of a physician could make delivery when he affixed to the container a label detailing specific information relating to the physician, the patient, and the directions for the use of the compound. Refills were allowed only as designated by the prescription. A physician could deliver such drugs "in the course of his practice" but he also was required to label the container. Possession without a prescription, refusal of a pharmacist to keep specific records, or failure upon proper demand of a pharmacist to reveal the records which the act required all constituted violations.

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[63] *See* Act of March 20, 1940, ch. 297 [1940] GEN. LAWS MISS. 532.

[64] *See* Act of April 12, 1952, ch. 256 [1952] GEN. LAWS MISS. 287 (repealed 1971).

[65] Act of Mar. 1, 1962, ch. 396 [1962] GEN. LAWS MISS. 686 (repealed 1971).

[66] *Id.* § 2.

Certain exemptions to the requirements of the act were also included, however. If preparations containing barbituric acid did not contain a quantity sufficient to induce "a hypnotic or somnifacient effect"[67] or if the preparation was intended for external application, it was exempt from the regulation of the act. Further, patent or common medicines designed by reputable manufacturers for the exclusive use in the treatment of sick animals remained exempt from the regulations of this act. Exemptions from that portion of the act requiring strict labeling of the container in which the drugs were possessed, as well as the provisions proscribing possession without a prescription, were granted to several classes of individuals while engaged in the performance of their official duties.[68] The listed classes included pharmacists, physicians, individuals engaged in scientific research, teaching and testing, hospitals which procured the substances for dispensation by medical practitioners, the personnel of enforcement agencies, manufacturers and wholesalers, and common carriers and warehousemen.

These exempt classes, however, were required to make and retain complete records of all stocks of barbiturates and stimulants in which they dealt.[69] Further, these records were available for inspection at all reasonable hours to the personnel of the State Board of Pharmacy.[70]

The penalties for the unlawful possession or delivery of barbiturates and stimulants were greatly increased by the legislation.[71] While under the regulatory statute existing prior to the passage of this act, a violation was punishable as a misdemeanor when the offense was committed against an adult and carried the imposition of a one to five year prison sentence when committed against one eighteen years old or younger, under this act a first offense violation carried a fine of not more than one thousand dollars and imprisonment for not more than five years. Increasingly harsher penalties were provided for second and subsequent offenses and for violations which were committed against minors.

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[67] *Id.* § 3.
[68] *Id.* § 4.
[69] *Id.* § 5.
[70] *Id.* § 6.
[71] *Id.* § 8.

2. *The Uniform Narcotic Drug Act of 1962*

By 1962 the passage of legislation relating to the control of narcotics without repeal of former legislation had conglomerated the existing law. However, the Uniform Narcotic Drug Act of 1962[72] repealed the early legislation, which had subsisted coincidentally with the uniform legislation of 1936, and amended that legislation to place greater emphasis upon conformity to the federal regulation of narcotics and to provide more severe penalties for violation of the narcotic drug law.

The right to classify new products as narcotic drugs, which had erroneously been vested in the State Board of Health by legislation in 1960,[73] was again placed within the State Board of Pharmacy. Further, a new criteria for determining which new products were to be classified as narcotic drugs was outlined. "[A]ny drugs found by the State Board of Pharmacy . . . to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine"[74] were to be so classified. After notice and the right to be heard were afforded to interested parties, such determinations were to become effective upon a date chosen in the discretion of the board.

Replacing the exemption concept of earlier legislation which enumerated specific amounts of restricted substances as exempt from regulation, the 1962 legislation exempted narcotic compounds upon an inverse basis to that which it provided for the inclusion of new narcotics. If a narcotic preparation was determined to possess no addiction-forming or addiction-sustaining liability or if that liability which it did possess was insufficient to require regulation, and if the preparation would not permit simple chemical recovery of the narcotic drug which it contained, it was exempt.[75] The State Board of Pharmacy was authorized to exempt any pharmaceutical preparation determined to be exempt under federal narcotics law without making its own determination. Conversely, the board was empowered to terminate exemption status based upon the same criteria. Termination required that the board make findings that the preparation possessed addiction liability and that, in its opinion, its unregulated use resulted in abuse. The findings were to be published in a newspaper of general circulation. Such findings were final, and the status of exemption ceased at the expiration of a period of six months from the date of publication.

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[72] Act of Mar. 1, 1962, ch. 397, § 6 [1962] GEN. LAWS MISS. 696 (repealed 1971).

[73] *See* Act of May 11, 1960, ch. 348, § 2 [1960] GEN. LAWS MISS. 520.

[74] Act of Mar. 1, 1962, ch. 397, § 3 [1962] GEN. LAWS MISS. 694 (repealed 1971).

[75] *Id.* § 4.

The penal section of the 1962 legislation retained the provision of the prior uniform enactment which imposed more severe penalties for repetitive violations. However, the uniform act of 1936 was restructured whereby the sanction for the illegal sale or delivery of narcotics was clearly differentiated from mere illegal possession of a restricted preparation. Further, delivery to one under the age of twenty-one, rather than to one eighteen or under as prescribed by earlier legislation, was made the focus of harsher penalties.[76]

In prescribing penalties for the violation of the narcotics law, *the degree of harm caused by the various narcotics was not considered.*[77] A single violation of the act, other than a violation consisting of an unlawful sale or delivery, resulted in a fine not exceeding two thousand dollars and imprisonment for a term not less than two years nor more than five years. A second offense occasioned a term of imprisonment increased from a minimum of two years to a minimum of five years; the monetary sanction remained the same. For subsequent offenses minimum imprisonment was to be ten years. Only in the instance of a first offense violation was the court competent to suspend the sentence or place the offender on probation. Likewise, only first offenders were eligible for parole before the minimum imprisonment had been served.

When the violation of the act consisted of unlawful delivery of a narcotic to one over twenty-one years old, the periods of incarceration increased, based upon the number of violations. First offenders were to be imprisoned for not less than five nor more than ten years, and second and subsequent offenders were to be imprisoned not less than ten nor more than twenty years. In each instance conviction also carried a maximum fine of two thousand dollars.

Finally, the penalty for the delivery of a narcotic to one under twenty-one years old was fixed as a fine not exceeding twenty thousand dollars and confinement in the penitentiary for a period not less than twenty years. The trial court was given discretion to confine one convicted of such an offense for a term encompassing *his entire natural life.*

In 1966 the Mississippi legislature classified lysergic acid diethylamide, commonly known as LSD, as a narcotic drug[78] and amended the penal section of the act to punish third offenders of the illegal sale narcotics laws by life imprisonment.[79]

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[76] *Id.* § 5.

[77] *Id.*

[78] Act of June 17, 1966, ch. 449, § 1 [1966] GEN. LAWS MISS. 854.

[79] Act of May 6, 1966, ch. 450, § 1 [1966] GEN. LAWS MISS. 856.

Prior to the recently enacted remedial legislation, the penalties imposed for the violation of this state's regulatory narcotics laws were based upon an unrealistic classification. Identical penalties were imposed for violation irrespective of whether the violation related to marijuana or heroin.[80] The legislation, in direct conflict with acknowledged medical fact, grouped several substances under the definition of "narcotic drugs," while in reality at least two of three substances fell within the classification of hallucinogenics.[81] Further, the existing law made scant provision for rehabilitation of the user or addict and did little to educate society to the dangers of drug abuse.[82]

III. An Analysis of The Uniform Controlled Substances Act of 1971

The Uniform Controlled Substances Act of 1971 abolishes the diverse laws dealing with drugs in this state and establishes a comprehensive drug act covering all aspects of the problem. The more controversial and significant parts of the 1971 Act will be analyzed. The inquiry centers around the areas that most affect the general public and upon which the members of the bench and bar have been and will be implored to provide comment and explanation.

A full discussion of drug abuse in relation to the 1971 Act and the possible ramifications of the new law far exceeds the physical limitations of this paper. The immediate discussion is intended to be extensive enough to provide the practitioner with a knowledge of the substance of the 1971 Act, the various interpretations that may or have been given the law, and any possible alternative or considerations that may now or at some later time ripen into cause for possible and necessary change in either the law itself or its interpretation. Accomplishing this goal requires a look at the three major divisons in the 1971 Act: (1) classification of the controlled substances, (2) penal sections of the law, and (3) educational, research and rehabilitative provisions.

A. Drug Classification

1. *The Structure of the Law*

The first question to be asked concerning any drug law is whether or not the classification of the substances is realistic. Mississippi's classification arrangement is based upon that of the Federal Drug Control

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[80] *Id.*

[81] *Id.*

[82] Miss. Code Ann. § 6216-02 (1956).

Act of 1970.[83] This grouping was followed and used by the National Conference of Commissioners on Uniform State Laws in adopting their Uniform Controlled Substances Act in 1970.[84] Mississippi adopted this classification verbatim.[85]

After the Mississippi law sets out its purpose,[86] establishes the Mississippi Bureau of Drug Enforcement within the State Board of Health,[87] and defines the terms used in the Act,[88] the law categorizes drugs into five separate groups or schedules.[89] The basis for the division is the individual drug's potential for abuse, accepted medical use, safe use under medical supervision, and whether abuse of the drug may lead to physical or psychological dependence.[90] Schedule I includes drugs with a high potential for abuse, wihout any accepted medical use, and lacking safety even under medical supervision. This group of 81 substances includes those drugs that are best known to the average person such as heroin, LSD, marijuana, mescaline, and peyote.[91] The 22 drugs in Schedule II also have high abuse potential, but with severe restrictions they have recognized medical use. Abuse of these drugs is said to "lead to severe psychic or physical dependence."[92] Opium, cocaine, and methadone are included in this group. Schedule III includes the stimulants amphetamine and metamphetamine (speed) and the depressant barbiturates and their derivatives. This schedule also includes preparations containing a certain amount of a narcotic having a potential for abuse lower than that of the previous schedules and with accepted medical use in treatment and whose abuse "may lead to moderate or low physical dependence or high psychological dependence."[93] Schedule IV encompasses drugs with low abuse potential, approved medical use, and limited physical or psychological dependence in relation to Schedule III drugs. Schedule IV includes barbital and phenobarbital.[94] Schedule V drugs include various mixtures which contain opium and/or codeine in minute quantities and which are considered to be less dangerous than those in the other schedules.[95]

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[83] 84 Stat. 1245, 1247, 21 U.S.C. §§811-12.

[84] National Conference of Commissioners on Uniform State Laws, Uniform Controlled Substances Act, 223 (1970) [hereinafter cited as 1970 Commissioners' Act].

[85] Miss. Code Ann. §§ 6831-51 to-88 (Supp. 1971).

[86] *Id.* § 6831-52.

[87] *Id.* § 6831-53.

[88] *Id.* § 6831-56.

[89] *Id.* §§ 6831-57 to -61.

[90] *Id.*

[91] *Id.* § 6831-57.

[92] *Id.* § 6831-58.

[93] *Id.* § 6831-59.

[94] *Id.* § 6831-60.

The State Board of Health is empowered to add, delete, or reschedule a substance covered by the act by considering the same physiological and social criteria as the United States Attorney General must consider in making the same determination about the federal law. The eight guidelines are:

> (1) The actual or relative potential for abuse;
>
> (2) The scientific evidence of its pharmacological effect, if known;
>
> (3) The state of current scientific knowledge regarding the substance;
>
> (4) The history and current pattern of abuse;
>
> (5) The scope, duration, and significance of abuse;
>
> (6) The risk to the public health;
>
> (7) The potential of the substance to provide psychic or physiological dependence liability; and
>
> (8) Whether the substance is an immediate precursor of a substance already controlled under this article.[96]

It should be noted that if a substance is added, deleted, or rescheduled under the federal law and the State Board of Health is given notice of the action, the State Pharmacy Board shall control the drug under the terms of the Mississippi Act unless either these two agencies or the Bureau of Drug Enforcement object. In that case a hearing shall be held with the objections being published and all interested parties given an opportunity to be heard. The Board of Health's decision is also published and final unless altered by statute.[97] Since specific, identifiable standards are used by the board and since the legislature is empowered to change a decision of the board, the touchy question of whether or not this is an unconstitutional delegation of legislative power to an administrative board is hopefully avoided. Nevertheless, only a court decision can adequately answer this problem.

The Act also empowers the State Board of Pharmacy to regulate and control the manufacture, distribution, and dispensing of the controlled substances, and strict licensing requirements are stipulated.[98] The issuance of search warrants and administrative inspection warrants is authorized, and warrants are to be executed by state judges according to stringent procedural requirements.[99] Drug enforcement officers are authorized to carry firearms and make searches, arrests, and seizures of property pursuant to the Act.[100]

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[95] *Id.* § 6831-61.

[96] *Id.* § 6831-55(a)(1)-(8).

[97] *Id.* § 6831-55 (d).

[98] *Id.* §§ 6831-63 to -69.

2. *Other Classification Alternatives*

A very specific and technical approach has been used by Mississippi's Uniform Act because of the technical nature of the substances with which the law deals. Literally hundreds of drugs have a high potential for abuse. The technical nomenclature and classification of the substances require a sound method of dealing with them. Nevertheless, the possibility does arise that we may not be handling the situation in a totally realistic and practical manner. From a medical standpoint the schedule classification of the 1971 Act may be the obvious solution. But the classification for the purpose of penal sanction and research, educational, and rehabilitative programs may dictate an alternate approach. What is ideal and workable from a medical viewpoint may not be adequate to solve the social problem. This is not necessarily to suggest that the eight factors of § 6831-55 allowing for deletion, rescheduling, or designation of controlled substances will not enable the act to effectively combat the drug problem. But other ideas have been advanced concerning the classification of the drugs to be controlled.

Neil Chayet, a Massachusetts attorney who has served as a consultant for the National Institute of Mental Health's Center for Studies of Narcotic and Drug Abuse, has suggested a fourfold categorization of the drugs that are most abused. First to be regulated are the true narcotics, such as heroin and morphine, which are physically addicting. The second category would be the hallucinogenic drugs such as LSD and philocybin which seem to cause damage to body functions. Marijuana, the drug most abused by young people, would be a third category necessitating special attention from the law. The fourth group would include all other dangerous drugs, such as barbiturates and amphetamines.[101] This approach, categorizing drugs according to their abuse tendencies, would perhaps be more easily justified from the standpoint of handing out punishment and providing research and rehabilitative facilities.

Connecticut's omnibus drug act, which took effect in 1967, has been called "the most comprehensive and forward-looking legislation dealing with drug abuse."[102] The approach toward control of the abusive substances focuses mainly upon education and treatment. The act, providing for both marijuana and LSD, plainly divides them according to their separate effect upon body and mind. Amphetamines, barbiturates, hallucenogens, including LSD, cocaine, and marijuana are all separately defined in order to determine the differences in their common properties. Two separate categories of "narcotic drugs" and "controller drugs" are also established. Possession of controlled drugs like LSD is a misdemeanor punishable by up to one year in jail or a $1,000 fine or both for each conviction. A greater penalty is imposed for manufacturing, selling, or trafficking in the drugs.

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[99] *Id.* §§ 6831-75 to -76.

[100] *Id.* § 6831-75.

[101] Chayet, *supra* note 7, at 11.

[102] *Id.* at 18; CONN. GEN. STAT. ANN., PUBLIC ACT 555, §§ 1 (13) (18), 36 (b), 37 (b), 40(a), 49(a), 61, and 68 (1967), are cited as authority in Chayet, *supra* note 7, at 18-20.

The most progressive features of the Connecticut law are its educational and rehabilitative goals. The courts in their discretion may provide medical treatment for an offense rather than a jail sentence and fine. Since drug dependence can cause serious problems of the mind and body, Connecticut provides both medical and psychiatric help to cope with the mental and physical disturbances that are caused by using the more dangerous drugs like heroin, metamphetamine, and LSD. Emergency care is also provided in instances where "bad trips" from hallucinogens recur weeks or months after the initial exposure. The law further states that the effects of misuse of alcohol and the controlled drugs upon the individual and society shall be taught to all pupils in public school above the fifth grade. State colleges also must teach drug abuse classes plus provide instruction on the best ways in which to teach the subject.[103] The Connecticut law thus exemplifies an official recognition of the need for treating drug abuse as a decay that affects both the mind and body. This fact, in turn, requires the strong educational and rehabilitative legislation that Connecticut has seen fit to enact.

Even though research in the area of drug abuse is not complete, many volumes of studies by commissions, pharmacists, psychiatrists, sociologists, doctors, and law enforcement officials have contributed to the total amount of knowledge of drugs. The recent Illinois case of *State v. McCabe*[104] provides the best concise description at this time from a legal point of view, of the effects of the major abused drugs upon the human body and mind. The drugs analyzed include heroin, morphine, cocaine, marijuana, barbiturate, amphetamines, and the "psychedelics" like LSD.[105] The text of the effects of these substances is included in Appendix I.[106]

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[103] *Id.*

[104] 49 Ill. 2d 338, 275 N.E.2d 407 (1971).

[105] *Id.* at 410-12.

[106] Following the classification discussion, the court in *McCabe* held that the classification of marijuana under a statute having a mandatory ten-year sentence

B. Penalties and Prohibitions

The penalty sections of previous laws in Mississippi obviously did not have the effect of curtailing the increase in drug abuse.[107] Harsh penalties failed to be a deterrent factor and greatly curtailed any real attempt at rehabilitation.

Attempting to remedy this situation, the new law adopted a reconstructed penalty section which was taken in great measure from the new federal legislation and almost verbatim from the 1970 Uniform Controlled Substances Act of the National Conference of Commissioners on Uniform State Laws.[108] Penalties under this new Mississippi legislation differ according to what specific act a person is committing. Penalties for one who would "manufacture, deliver, or possess" a controlled or counterfeit substance are divided into two categories: For the narcotic drugs found in Schedules I and II the maximum penalty is six years imprisonment, or a two thousand dollar fine or both. For all other substances in Schedule I, II, and III, maximum penalties are four years imprisonment or a two thousand dollar fine or both. A Schedule IV violation carries a two year imprisonment or a one thousand dollar fine or both; and a Schedule V violation is a misdemeanor punishable by a six month confinement or a five hundred dollar fine or both. It is important to note that Mississippi's law punishes one who would "manufacture, deliver, or possess" a prohibited substance,[109] while the federal law and the Uniform Act of the Commissioners adds the phrase "with intent" to manufacture or dispense.[110] Then, however, the Act makes it illegal knowingly or intentionally to possess a controlled substance without a valid prescription. This offense is a misdemeanor punishable by six-months incarceration or a five hundred dollar fine or both.[111]

The above language has caused more controversy than any other provision of the Mississippi Act. This was brought about by the fact that the penalty for possession of the controlled substances could conceivably be either a felony or a misdemeanor. Since the Act gave the trial judges the discretionary power to suspend a first offender's sentence,[112] and since an offender could be charged for either a felony or

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upon first conviction, rather than under a more recent law with a maximum one year jail term for first offense and with no prohibition of probation, was arbitrary and deprived the appellant of equal protection. *Id.* at 414.

[107] *See supra* notes 4 and 5.

[108] 1970 COMMISSIONERS' ACT, *supra* note 84.

[109] MISS. CODE ANN. § 6831-70(a), (b) (Supp. 1971).

[110] 84 Stat. 1260, 21 U.S.C. § 841 (1970); and 1970 COMMISSIONERS' ACT, *supra* note 84.

[111] MISS. CODE ANN. § 6831-70 (c) (Supp. 1971).

[112] *Id.* at § 6831-74 (d) (Supp. 1971).

misdemeanor for possession, the sentences for the same prohibited act could very well differ from one judicial district to another.

On March 27, 1972, the Mississippi Supreme Court was faced with the issue of which penalty would be applied to one convicted of possession of a controlled substance. In *Johnson v. State*[113] the court affirmed a conviction for possession of LSD but remanded the case for resentencing under the misdemeanor provision. The court's reasoning was simply that the rule of *Grillis v. State*,[114] a 1944 decision, was applicable. Quoting from *Grillis*, the court said, "[w]hen there is substantial doubt as to which of the two [penalties] is to be applied, the case will be referred to the statute which imposes the lessor punishment."[115] Marijuana was given the same treatment as LSD in *Wolf v. State*,[116] decided the same day. Justice Sugg's strong dissent sought to distinguish *Grillis* and noted that the legislature's intent was to permit punishment either as a felony or a misdemeanor, discretion being vested in the trial judge.[117]

It is submitted that the *Johnson* opinion is most unsatisfactory because it avoided any mention of the real and pressing issues that were presented by the facts and which are still at stake. The brief for the State in *Johnson* alleged that the clear intent of the drafters of the Act was to make possession of the controlled substances a felony rather than a misdemeanor. This, the State said, was accomplished by leaving out the words "possess with intent to manufacture or deliver" from the felony provisions of § 6831-70. It was further argued that the misdemeanor portion of the section was to be applicable only to those drugs which could be obtained by a prescription.[118]

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[113] 260 So. 2d 436 (Miss. 1972).

[114] 190 Miss. 576, 17 So. 2d 525 (1944).

[115] Johnson v. State, 260 So. 2d 436, 439 (Miss. 1972).

[116] 260 So. 2d 425 (Miss. 1972).

[117] Johnson v. State, 260 So. 2d 436, 439 (Miss. 1972) (dissenting opinion).

[118] *Id.* Brief for Appellee. In the brief the State said:

> The primary architects of the legislation . . . believed that proof of intent to sell was simply too great a burden to place on local prosecutors and, most important, possession of extraordinarily dangerous substances simply ought to be punished as a felony rather than as a misdemeanor.
>
> . . . On the other hand, the language of the federal misdemeanor provision was left virtually intact . . . because (Senator) Collins has assured . . . the . . . members that subsection (c) dealt only with the substances which could be obtained by a valid prescription but which had been obtained without one. . . . Thus, in this jurisdiction, one who obtains and possesses a drug . . . without a valid prescription where that drug could be lawfully obtained pursuant to a prescription, is guilty of a misdemeanor.

The original 1970 Act of the National Conference of Commissioners on Uniform State Laws throws a great deal of light on the meaning that was to be given the penalty section. Since the "intent to manufacture or deliver" was the only phrase in all the penalty section omitted from the Mississippi law, the comment of the Commissioners on the meaning of the entire section as a whole is most enlightening:

> Subsection (c) has been drafted specifically to provide for a lesser penalty for *simple possession* than is provided for the *trafficking and illicit manufacturing type offense* under subsections (a) and (b). It is contemplated that subsection (a) and (b) will contain harsh penalties . . .; subsection (c) provides for misdemeanor . . . treatment for the simple possession charge, (emphasis added).[119]

It would seem that by merely omitting the words "with intent to manufacture or deliver" from the Mississippi law under subsection (a) and (b) of § 6831-70, the legislature's otherwise verbatim adoption of the penalty section of the 1970 Act of the Commissioners may not void the comment of the original authors of the provision. Leaving out "intention" from subsections (a) and (b) perhaps would not lessen the original meaning that the language was to apply to "trafficking and illicit manufacturing type offenses."[120] This reasoning is in accord with that of Congress when the 1970 federal law was being adopted. At that time it was noted: "Possession of controlled drugs is made a misdemeanor, except where the possession is for the purpose of distribution to others."[121]

By avoiding these two major arguments concerning this major penalty section of Mississippi's Uniform Controlled Substances Act, the court has obviously placed the burden to provide a satisfactory explanation upon the legislature. The specific action the legislature might eventually take is a matter for conjecture; however, the authors contend that the main thrust of legislative concern will be in the area of penalties for possession of LSD and marijuana—the subject of the *Johnson* and *Wolf* decisions. Any potential new law should gear its penalties to consider the nature of the offense, the quantity of the drug, and the accused's prior record. It also would be desirable for Mississippi to broaden the rehabilitative provisions for offenders, as has been done in Connecticut.

The other major penal provision of the Uniform Controlled Substances Act of 1971 is § 6831-74, which deals with distribution to minors, penalties for first and subsequent offenses, and the availability of resentencing for first offenders convicted prior to the passage of this new law.[122]

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[119] 1970 COMMISSIONERS' ACT, Comment on § 401, *supra* note 84 at 248.

[120] *Id.*

[121] 3 U.S. CODE CONG. & AD. NEWS 4570 (1970).

Anyone over 21 years old who delivers narcotic drugs to one under 21 is subject to a two thousand dollar fine and up to twelve years imprisonment or both. Anyone over 18 years old who delivers any controlled substance to a person under 18 is subject to the fine and double the prison term for comparable drug trafficking under § 6831-70.[123] For second and subsequent offenses contrary to any portion of the 1971 Act, a person can receive both a doubled fine and imprisonment, except for the simple possession charge under § 6831-70 (c).[124] This policy statement, providing greater punishment for "pushers" of illicit drugs, strengthens the contention that the felony provisions of the new act were meant to strike hardest at those who would profit from the traffic in illegal narcotics and not at the person who is made a felon for possession of a small quantity of a controlled substance. Section 6831-74 further gives the trial judge the power to suspend any and all of the penalty for a first offender. It should be noted that this first offender treatment is discretionary with the judge and is not available as a matter of right.[125]

One point of interest in § 6831-74 concerns the resentencing of those persons convicted prior to the passage of the 1971 Act. Persons in prison under earlier drug statutes are allowed to petition the courts of original jurisdiction for resentencing according to the new law,[126] and the Mississippi Supreme Court has consistently upheld this procedure.[127]

C. *Education, Research, and Treatment*

Mississippi's 1971 Drug Law contains two comprehensive sections dealing with education and rehabilitation in the field of drug abuse.[128]

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[122] Miss. Code Ann. § 6831-74 (Supp. 1971).

[123] *Id.*

[124] *Id.* at § 6831-74(a), (c).

[125] *Id.* at 6831-74 (d).

[126] *Id.* at 6831-74 (f).

[127] Smith v. State, 248 So. 2d 436, 439 (Miss. 1971) in which the court said:

> Appellant is a young man twenty-two years of age, and according to the record in this case, is a first offender, and we deem it proper and in keeping with the intention of the Legislature that his conviction be affirmed, but that the case be remanded to the trial court for an imposition of a sentence in accordance with the provisions of the Uniform Controlled Substances Act.

See also Sims v. State, 257 So. 2d 210 (Miss. 1972); Pooley v. State, 257 So. 2d 213 (Miss. 1972); and Gisch v. State, 259 So. 2d 118 (Miss. 1972).

[128] Miss. Code Ann. §§ 6831-81,-82 (Supp. 1971).

By the provisions, the Mississippi Bureau of Drug Enforcement, State Board of Education, State Board of Pharmacy, and State Board of Health are given broad powers to aid in the fight against the misuse of drugs. These powers include organizing both public and law enforcement educational programs, studying and using new techniques in research activities, promoting better recognition of the problem of drug abuse, and allowing the possession and distribution of the controlled substances plus immunity from prosecution to those authorized in drug research. Since this portion of Mississippi's law is taken directly from the Act of the Commissioners on Uniform State Laws, their Comment on these provisions is noteworthy:

> This Section, setting out the education and research provisions, is designed to make it clear that education and research are an integral part of the total law enforcement effort. Broad language is used in order to provide maximum latitude.[129]

The "broad language" used by the law in the area of education and research should be actively utilized in order to better inform our citizens of the dangers of drug abuse. These two sections of our law can be very effective if they are used to their fullest extent.

IV. CONCLUSION

The Uniform Controlled Substances Act of 1971 is an admirable attempt by the Mississippi Legislature to face the drug problem that challenges every level of society. Even though some of its sections appear ambiguous and inconsistent, it fills a large void by its all-encompassing structure.

Realizing that any drug legislation is not a "this or nothing else" proposition, it is submitted that our court's recent interpretation of the 1971 Act in the *Johnson* decision will evoke much controversy and further legislative action. Adopting a well-reasoned uniform act in 1971 was a wise move on the part of the legislature, but subsequently giving the law a myriad of interpretations is a great disservice to the Act itself and to the people of Mississippi who must live under its provisions.

It is hoped that if a different legislative approach to drug misuse is adopted, it will not be piecemeal like earlier legislation and that it will maintain a thoroughly reasoned, well-designed, and comprehensive approach to the problem. The Uniform Controlled Substances Act of

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[129] 1970 COMMISSIONERS' ACT, Comment on § 508, *supra* note 84 at 261.

1971 can be a firm starting point from which we can effectively meet and defeat drug abuse in Mississippi. As Neil Chayet noted in 1968:

> [Drug abuse] . . . is a great challenge to the law, which must prevent persons from injuring themselves through improper and uncontrolled use, yet must permit and encourage meaningful research. The law accomplishes very little when the only result is to make felons of young people seeking a new thrill. The many challenges can and must be met, and all of us . . . must work together to meet them.[130]

William C. Trotter, III
William M. Chaffin

APPENDIX I

*Effects of Commonly Misused Drugs**

Heroin and morphine are true narcotic analgesics in the sense that their use produces a marked indifference to pain. In addition, when injected intravenously a warm flushing of the skin and intense pleasurable sensations in the lower abdomen will result. Repeated usage of these drugs in a comparatively short time will result in the development of a tolerance, that is, a state which requires a gradually increasing dosage to permit the drug to attain the effect desired. Both a psychological and compelling physical dependence result from the use of "hard narcotics." The physical dependence develops in intensity with continued use and requires the continued administration of the drug to avoid withdrawal symptoms. It appears that the subjective action of the morphine-type drugs also involve changes in mood, an inability to concentrate and the development of apathy. Physical degeneration occurs, arising from drug preoccupation, personal neglect, malnutrition and susceptibility to infections. Overdosage can cause death through excessive respiratory depression.

Early withdrawal symptoms include lacrimation, nasal discharge, yawning and perspiration. Later, dilated pupils, loss of appetite, gooseflesh, (thus, the expression "cold turkey") restlessness and increased irritability and tremor will appear. At its peak intensity, the syndrome includes high irritability, insomnia, violent yawning, severe sneezing and lacrimation. Nausea and vomiting are common, as are intestinal spasms and diarrhea. Increased heart beat and elevated blood pressure, as well as muscular spasms, abdominal cramps and pains in the bones and muscles of the back are common. Death due to cardiovascular collapse can result from withdrawal. The symptoms are caused by the drug-induced alterations at the cellular level, most prominently in the central nervous system. Most authorities consider that the drug addict's frequent involvement in criminal activity results from his acute need for the drug rather than because of the action of the drug itself. The term addiction refers to the physical, rather than a psychological dependence on the drug.

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[130] Chayet, *supra* note 7, at 22.

*Illinois v. McCabe, 275 N.E. 2d 407, 410-12 (Ill. 1971).

Cocaine . . . is a powerful stimulant, whereas the morphine-type drugs have a depressing action. Too, cocaine is further unlike the opiates in that it does not have effects of tolerance or physical dependence and abstention does not cause acute withdrawal symptoms. However, because of its potent nature, it induces intense physical and mental excitation and a marked reduction in normal inhibitions which often results in aggressive and even violent behavior. Intense hallucinations and paranoid delusions are common and, because of this, cocaine users frequently attempt to dilute the experience with a depressant such as heroin or morphine.

The properties and consequences of the use of marijuana differ from those attending the use of opiates or cocaine. The acute physical symptoms of marijuana use typically induced are an increase in pulse rate, a slight elevation in blood pressure, conjunctival vascular congestion, a rise in blood sugar, urinary frequency and dryness of the mouth and throat. Nausea, vomiting and occasional diarrhea have been observed, as has the inability to coordinate voluntary muscular movements. There is usually a marked increase in appetite. Deaths due to overdose apparently have not been reported.

The mental or subjective effects of the administration of this drug are variable and depend on the interaction of several factors including the physical and pharmacological properties of the particular marijuana used, the amount of dosage, and more importantly, what has been called the character structure of the user, (including his experience with the drug, his attitude and expectations) and the social setting or environment in which the drug is used. The most common reaction is the development of a euphoric state of altered consciousness in which ideas seem disconnected, uncontrollable and freely flowing. Time perception is distorted with minutes seeming like hours. Spatial conception may also be disturbed. Vivid hallucinations, usually, but not always, pleasant, can occur with increased dosage. There may be marked alterations of mood, usually manifested by an extreme feeling of well being which is often accompanied by uncontrollable laughter. Later a more somber or depressed mood will appear. The drug's influence can cause anxiety, confusion or disorientation, and with larger doses temporary psychotic episodes have been observed in predisposed individuals. Inhibitions are reduced but violent or otherwise aggressive behavior seems to be rare.

Almost all authorities agree that marijuana is not a narcotic or addictive in the sense that the terms are precisely used. Unlike the opiate drugs, it does not produce a physical dependence, and upon abstention there are no withdrawal symptoms. A tolerance to the drug does not develop. Marijuana use does, however, lead to a mild psychological dependence. The short-hand descriptive phrase most often applied to the drug is "mild hallucinogen," although this refers to only one of its many effects.

. . . Frequent use of the barbiturates at high dosage levels leads invariably to the development of physical dependence, tolerance and severe withdrawal symptoms, similar to those associated with heroin use. The effects of barbiturate intoxication resemble those of alcoholic intoxication. There is a general sluggishness, difficulty in concentrating and thinking, speech impairment, memory lapse, faulty judgment and exaggeration of basic personality traits. Irritability and quarrelsomeness are common. Hostile and paranoid ideas as well as suicidal tendencies can occur. Barbiturates are said to be the most frequently used chemical in suicides in the United States. Accidental death from an overdose also can occur. There is a clear association between barbituric intoxication and accidents and traffic fatalities. The drug can depress a wide range of functions, including the nerves, skeletal muscles and the cardiac muscle. Barbiturates are frequently used by heroin addicts to boost the effect of weak heroin.

The consensus of the amphetamines (stimulants) is that, unlike the barbiturates, their abuse does not lead to a physical dependence, but the development of a high tolerance and strong psychological dependence are common. Occasional dosage under medical supervision causes only an elevation in mood and a state of well-being. Long term dependence however, leads to serious mental and physical problems. Malnutrition and debilitation due to self-neglect will appear. A well known complication of amphetamine abuse is paranoid schizophrenia. The user may react violently to his persecutive delusions. Visual and auditory hallucinations occur and can persist long after use is discontinued. Although true withdrawal symptoms do not occur, the latter stages of excitement and mental disarrangement are difficult to endure. To take the edge off this tense euphoria, the user will sometimes turn to barbiturates or the opiates.

Special mention should be made of one particular amphetamine, metamphetamine, commonly called "speed." Its effects are generally the same as other amphetamines, only markedly intensified. There is evidence that large doses result in permanent brain damage. The drug's lethal qualities are well documented. The potential for violence, paranoia and physical depletion are substantially more severe.

. . . LSD is the best known and one of the highly potent [hallucinogens or "psychedelics"]. Less potent hallucinogens include psilocybin, peyote, and mescaline and hashish (another derivative of the plant from which marijuana comes). As with marijuana usage, a true physical addiction does not occur with LSD, in that withdrawal effects do not follow abstinence. Frequent use of LSD will lead rapidly, however, to the development of a high tolerance. Psychological dependence develops as it does with exposure to almost any substance which alters the state of consciousness. During LSD-intoxication severe panic and paranoid reactions are encountered. Attempts at suicide as well as uncontrolled aggression are among the dangers to the intoxicant. Hallucinations are common, accompanied by feelings of grandiosity and omnipotence. Recurrences of the LSD experience weeks or months after the last drug intake are well known. Various emotional disorders have been observed following exposure to LSD. A chronic anxiety state is the most common. Prolonged psychotic reactions also have been identified with LSD. Too, there is also growing evidence that LSD can cause chromosomal damage.

APPENDIX II

On May 19, 1972, the Mississippi Legislature amended the Uniform Controlled Substances Act. The main thrust of the amendment was to change the penalty section of the 1971 Act and to reorganize the drug enforcement authority.

The Mississippi Bureau of Drug Enforcement was designated the Mississippi Bureau of Narcotics, transferred to the Department of Public Safety, and the agent strength of the Bureau was increased from twenty-four to fifty.

The amendment greatly stiffened the penalties for possession with intent to manufacture or deliver and for the selling or "pushing" of controlled substances. For example, the penalty for selling the hard narcotics of Schedules I and II was increased to a possible thirty (30) years or a $30,000.00 fine, or both. The penalties for mere possession were redefined, and marijuana was placed in a separate category. Possession of less than an ounce of marijuana is now punishable by not more than one (1) year in the county jail or a $1,000.00 fine, or both. With possession of over an ounce, one could spend three (3) years in the State Penitentiary.

Individual judges are still empowered to suspend the sentences of first offenders, and an offender under age twenty-six (26) may apply to have the official records expunged of his offense. First offenders under twenty-one (21) shall be confined in a hospital, and any one convicted of a drug offense who is found to be dependent upon or addicted to a controlled substance may receive medical treatment for his condition.

PRIVATE REMEDIES FOR BEACH-FRONT PROPERTY DAMAGE CAUSED BY OIL POLLUTION OF MISSISSIPPI COASTAL WATERS

I. The Problem

> [T]he technology of oil — its extraction, its transport, its refinery and use — has outpaced laws to control that technology and prevent oil from polluting the environment. In short, oil is largely out of legal control. It is out of legal control in the United States and around the world.[1]

Over one million tons of petroleum products move up and down the coastal and inland waters of the United States every day.[2] Such a large volume of oil passing in commerce makes it inevitable that some of it will find its way from the confines of vessels into the navigable waters of the United States. Upon contact with water, oil forms an emulsion, giving the water a "sheen." As little as fifty gallons of oil per square mile are sufficient to create a "sheen" which, if untreated, can cause substantial damage to waterfowl, shellfish, aquatic biota, boats, piers, and beaches.[3]

The greatest danger of oil pollution does not come from huge oil tanker wrecks and collisions. Such incidents are relatively rare,[4] and the likelihood of their occurring off the Mississippi coast appears remote.[5] Of much greater impact are the countless number of "small oil spills" created by ocean going vessels through human negligence, cleaning of salt water ballasts, dumping, pumping bilge waters, cleaning oil tanks, and transferring and handling oil cargos.[6] These "small oil spills" have the "most serious and long term effects on the environment."[7] Over two thousand of these "small oil spills" were estimated to have occurred on the navigable waters of the United States in 1966.[8]

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[1] Edwards, *Oil Pollution and the Law,* OIL POLLUTION PROBLEMS AND POLICIES 21 (S. Degler ed. 1969) [hereinafter cited as Edwards].

[2] *Id.* at 24.

[3] Biglane & Wyer, *Oil Pollution Control Legislation and the Water Quality Improvement Act of 1970, the Federal Viewpoint,* in PROCEEDINGS OF THE JOINT CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS 11, 13 (1971).

[4] Edwards, *supra* note 1, at 23, states: "In 1966, only six tankers were actually sunk at sea. This amounts to less than 0.1 percent of the tankers in operation."

[5] Edwards, *supra* note 1. For a discussion of some of the major oil spills *see* Lohne, *Oil Pollution of Coastal and Inland Waters of the United States Under the Water Quality Improvement Act of 1970,* 38 INS. COUNSEL J. 49 (1971); Shutler, *Pollution of the Sea by Oil,* 7 HOUSTON L. REV. 415 (1970); Sweeney, *Oil Pollution of the Oceans,* 37 FORDHAM L. J. 155 (1968).

[6] Edwards, *supra* note 1, at 23.

[7] Biglane & Wyer, *supra* note 3, at 12.

As a coastal state Mississippi is subject to pollution from these "small oil spills," the large number of which pose a problem to public and private property in Mississippi that is far from academic. This paper will be limited to a discussion of the remedies a Mississippi citizen owning beach-front property along the Gulf Coast may have for pollution damage to his land caused by the discharge of oil from sea-going vessels. Oil pollution from off-shore drilling rigs is discussed only to the extent that it relates to the overall theme of this paper.[9] This paper does not attempt to cover oil spills on navigable watercourses within Mississippi, although many of the principles discussed herein will be applicable to such a situation.

II. Mississippi Statutory Pollution Law

When oil pollution strikes the beach-front property owner, it costs him money.[10] If he lives on the beach, oil on his land, boats, and piers will have an obvious effect on his use and enjoyment of the property.[11] Somehow, he has to (1) get the oil off his property and (2) seek legal action to restore his beach to its former condition. The owners of commercial establishments such as hotels and restaurants which front on the beach suffer damage to the appearance of their property from oil-blackened beaches plus monetary loss from a decline in the tourist industry.[12] They will want removal of the oil and restoration of their beaches to their former conditions to make their location again attractive to tourists.[13] An examination of current Mississippi laws on pollution may offer some guidance in the handling of a pollution case for a private citizen whose beach-front property has been covered by oil.

A. The Mississippi Air and Water Pollution Control Act of 1966

(1) General Provisions

In 1965 the Federal Water Quality Act, which required the states to be the leaders in water pollution control,[14] was passed. Under its provisions, each state had to establish specific water quality standards and comply with other general requirements.[15] In order to carry out the purposes of this federal act, in 1966 the Mississippi Legislature passed the Mississippi Air and Water Pollution Control Act.[16] This Act defines pollution as

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[8] Edwards, *supra* note 1, at 24 .

[9] 43 U.S.C. §§ 1331 *et. seq.* (1971) .

[10] Shutler, *Pollution of the Sea by Oil, supra* note 5, at 418.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 33 U.S.C. §§ 1151 *et. seq.* (1971) .

> [S]uch contamination, or other alteration of the physical, chemical or biological properties of any waters of the State, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the State as will, or is likely to, create a nuisance or render such waters harmful, detrimental or injurous to public health, safety or welfare. . . .[17]

To state the obvious, oil spilled upon coastal waters will come within the Mississippi definition of pollution. The Act specifically states that it covers pollution of the coastal zone by defining "waters of the state" to include "all waters within the jurisdiction of this State, including . . . such coastal waters as are within the jurisdiction of the State."[18] It is declared unlawful for any person to pollute Mississippi waters directly or to place a potential pollutant in such a position as is likely to cause pollution of Mississippi waters.[19] Discharges of wastes which reduce water quality standards are further prohibited.[20] The pollution or reduction in water quality levels of the waters of the state of Mississippi is declared to be a public nuisance.[21]

The enforcement arm under this Act is the Mississippi Air and Water Pollution Control Commission.[22] Violations of the terms of this Act or regulations and orders published under it, are "brought to the attention of the Commission by private citizens, legislators, sportsmen, game and fish wardens, conservation groups, college students, and, of course, by staff members in the normal course of their work."[23] Once an alleged violation has been reported to the commission, it may cause a written complaint and order to be served upon the alleged violator. Such complaint shall specify the provision or regulation violated, the facts supporting such violation, and shall order corrective action to be taken within a reasonable time.[24] The person so served has thirty days within which to request a hearing before the Commission.[25] If such hearing is not requested the order becomes final at the end of the thirty day period.[26] Appeals can be taken from any final order of the Commission to the chancery court and from there to the Mississippi Supreme Court.[27]

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[15] *Id.*

[16] MISS. CODE ANN. §§ 7106-111 *et. seq.* (Supp. 1971).

[17] *Id.* § 7106-112 (a).

[18] *Id.* § 7106-112 (f).

[19] *Id.* § 7106-118 (b).

[20] *Id.*

[21] *Id.*

[22] *Id.* § 7106-113 (a). Members of the commission include: The Director of the Division of Sanitary Engineering of the State Board of Health, Director of the State Game and Fish Commission, the Water Engineer of the State Board of Water Commissioners, the Supervisor of the State Oil and Gas Board, the Director of the State Plant Board, the Executive Secretary of the State Marine Conservation Commission, and four other members to be appointed by the Governor with the advice and consent of the Senate.

The Act provided for civil and criminal penalties for violations of its terms.[28] Violation of any regulation or order of the Commission subjects one to prosecution for a misdemeanor with punishment being from fifty dollars to three thousand dollars plus cost of prosecution and/or imprisonment in the county jail not to exceed one year.[29] Additionally, when the defendant violates the terms of this Act and kills fish or wildlife, he is liable to the state in an amount equal to the sum of money necessary to restore such fish or wildlife.[30] This money is recovered by the Commission, acting for the state in a civil action in a circuit court of proper venue.[31]

It is unfortunate that the Act, although certainly much needed and very useful in the broad legal sense, will not materially aid the private landowner whose beaches are covered with oil. No provisions for cleanup of pollution appears in the Act, nor is there any statement of liability for cleanup. The Act creates no new legal rights for the private landowner through which he can seek cleanup costs or damages for oil pollution. The legal remedies are given to the state, declaring that pollution of the waters of Mississippi constitutes a "public nuisance."[32] Traditionally, public nuisances are abatable only through the action of elected representatives of the people, not by action of private individuals.[33] The criminal penalities are payable to the state,[34] and the only civil remedy authorized by the Act is one by which the state may recoup its losses incurred in restocking the wildlife lost through pollution.[35]

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[23] Address by C. Andre, Mississippi Oil and Gas Law Seminar, Jackson, Mississippi, April 2, 1971.

[24] MISS. CODE ANN. § 7106-120 (a) (Supp. 1971).

[25] *Id.*

[26] *Id.*

[27] *Id.* § 7106-128.

[28] *Id.* § 7106-127 (a).

[29] *Id.*

[30] *Id.* § 7106-127 (b).

[31] *Id.*

[32] *Id.* § 7106-118 (b).

B. *The State Oil and Gas Board*

The State Oil and Gas Board has the responsibility of supervising all facets of the oil industry in Mississippi.[36] This includes limited power over oil pollution. The Act provides that the Board shall have the power, "to prevent the pollution of fresh water supplies by oil, gas, or salt water, and generally to prevent waste. . . ."[37]

It is obvious that this Act will not help the coastal landowner in his search for cleanup costs and damages. The Act applies only to pollution of "fresh water" by oil.[38] Moreover, it should also be noted that the Board is primarily concerned with the exploration, development and conservation of the oil and gas resources of the State of Mississippi.[39] The Board has no jurisdiction over vessels, but is limited solely to the oil producing industry.[40]

C. *Other State Agencies*

An examination of statutes concerning the pollution control jurisdiction of other existing state agencies[41] leaves the landowner in the same position. This writer has found no Mississippi act that gives a landowner the right to sue for cleanup or oil damage to his beachfront property.

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[33] W. PROSSER, LAW OF TORTS § 86 at 573 (4th ed. 1971) [hereinafter cited as PROSSER].

[34] MISS. CODE ANN. § 7106-127 (a) (Supp. 1971).

[35] *Id.* § 7106-127 (b).

[36] *Id.* §§ 6132-01 *et seq.*

[37] *Id.* § 6132-10 (c) (1).

[38] *Id.*

[39] *Id.* § 6132-10.

[40] *Id.*

[41] *See* Mississippi Mineral Lease Commission, MISS. CODE ANN. § 5947 (1956); Mississippi Park System, MISS. CODE ANN. § 5957-07 (Supp. 1971); Mississippi Game and Fish Commission, MISS. CODE ANN. § 5841 (1956); Marine Conservation Commission, MISS. CODE ANN. § 6047-04 (Supp. 1971); Marine Resources Council, MISS. CODE ANN. § 8946-151 (Supp. 1971); State Land Commissioner, MISS. CODE ANN. § 4070 (1956).

D. Conclusions - State Statutes

The major pollution control agency in Mississippi is the Air and Water Pollution Control Commission.[42] It has been suggested that because the Air and Water Pollution Control Act is general law, all state agencies are vested with enforcement authority.[43] While this may be a true statement, this writer feels that its powers are of such a general nature that it is of no benefit to the private individual whose beaches are polluted. Moreover, the current procedure of the Air and Water Pollution Control Commission, Enforcement Division, in cases where oil has been spilled onto Mississippi coastal waters, is to call in the United States Coast Guard to take whatever action it deems necessary.[44] This points out the weakness of Mississippi pollution legislation as it relates to beach-front property owners. State pollution statutes will not help him get the oil off his property nor will they give him a remedy for damages.

III. COMMON LAW ACTIONS

Since the owner of oil polluted beaches will not find relief in Mississippi pollution statutes, he must look either to the common law or to federal law. Traditionally, common laws suits for pollution have been brought as actions for trespass, negligence, public nuisance and private nuisance.[45] Pollution actions have also been maintained based upon strict liability,[46] and an admiralty remedy has evolved.[47] It is believed that trespass, negligence, and nuisance actions offer the only real possibility for recovery of damages for vessel oil pollution on private beaches.

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[42] Andre, *supra* note 23.

[43] *Id.*

[44] Telephone interview with Mr. William H. Penn, Jr. of the Mississippi Pollution Control Commission, Enforcement Division at Jackson, Mississippi, March 17, 1972.

[45] Reitze, *Private Remedies for Environmental Wrongs,* 5 SUFFOLK U. L. REV. 779, 798 (1971).

[46] Burns, *A Pollution Suit: Lawyer's Guide to Private Law Theory,* 15 TRIAL LAWYERS GUIDE 191 (1971). In the interest of maintaining this paper at a manageable length, "strict," or "absolute," liability theories will be omitted. For those who would pursue these remedies, an examination of the following may prove enlightening: Avins, *Absolute Liability for Oil Spillage,* 36 BROOKLYN L. REV. 359 (1970); Sweeney, *Oil Pollution of the Oceans,* 37 FORDHAM L. REV. 155 (1968); Note, *Private Remedies for Water Pollution,* 70 COLUM. L. REV. 734 (1970).

[47] An examination of the admirality remedy for oil pollution is beyond the scope of this paper. For detailed discussion of this remedy one may refer to the following: McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law,* 40 GEO. WASH. L. REV. 97 (1971); Shutler, *Pollution of the Sea by Oil,* 7 HOUSTON L. REV. 415 (1970); Sweeney, *supra* note 46.

A. Nature of the landowner's interest

Before examining the common law remedies it will be necessary to examine briefly the general and specific property rights possessed by beach-front property owners. One who owns beach-front property on the Mississippi coast has certain property rights peculiar to land abutting on water.[48] These rights are called littoral or riparian rights,[49] and they possess "the usual attributes and incidents of property."[50] Although the correct term for one owning property on a sea shore is "littoral proprietor," the term "riparian proprietor" has been used interchangeably with it to such an extent that, in most cases, a distinction between the terms is no longer drawn.[51]

The Mississippi Supreme Court has discussed the theory of riparian or littoral rights as follows:

> [O]wners of uplands bordering on submerged lands are riparian or littoral owners. Such owners of the shoreline have a peculiar property right correctly referred to as littoral rights. These rights originate in the juxtaposition of land and water, the enjoyment of the land and the water in connection with the land. *Littoral rights include the rights of navigation, boating, swimming and fishing;* and all these rights depend upon access to the water from the littoral owner's land.[52]

Riparian or littoral rights exist only for those who own beach-front property.[53] As stated earlier, these riparian or littoral rights have all the attributes and incidents of property,[54] so it would follow that any invasion of these property rights would give the landowner grounds to bring a common law action for trespass, negligence or nuisance.

The riparian landowner on the Mississippi coast is given certain rights by statute.[55] He may build boathouses, piers, wharfs, docks, pavilions and other structures on his land.[56] Such structures are his private property and even though they may rest partially on the submerged bottomlands that belong to the public, he is entitled to the exclusive use, possession and occupancy of them.[57] He may abate any public or private nuisance committed by anyone in the area of his riparian ownership, and may further "resort to any remedial action authorized by law."[58]

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[48] 56 AM. JUR. *Waters* § 274 (1961).

[49] *Id.*

[50] *Id.*

[51] *Id.* § 273.

[52] Harrison County v. Guice, 244 Miss. 95, 106-07, 140 So. 2d 838, 842 (1962).

[53] 56 AM. JUR. *Waters* § 283 (1961).

[54] *Id.* § 274.

[55] MISS. CODE ANN. § 6047-10 (Supp. 1971).

[56] *Id.*

[57] *Id.*

B. *Action for trespass*

At common law, every unauthorized entry upon the lands of another constituted a trespass, and entitled the landowner to damages.[59] Liability for trespass was, in effect, a form of strict liability.[60] However, the theory of trespass has been modified to the extent that one is liable for a trespass only in cases of intentional intrusions, negligence, or in the carrying out of an abnormally dangerous activity.[61] The trespass action is used to protect one's exclusive possession of land in its "intact physical condition."[62]

Oil which washes onto the beaches of the landowner will constitute a trespass, and the landowner will be entitled to damages for it.[63] Such damages could include recovery for aesthetic loss as well as actual damage to the land.[64] The landowner will be entitled to nominal damages for every trespass in Mississippi,[65] but in order to recover more than nominal damages, actual damages must be shown.[66]

A proper determination of damages for an oil trespass must include findings that the oil pollution either permanently or temporarily damaged the land. The prevailing view is that oil polluted beaches are temporarily, not permanently, damaged.[67]

Under current Mississippi law, if the beach were held to be temporarily damaged by oil, then the measure of damages would be the cost of restoration of the property to its former condition plus compensation for loss of its use.[68] If the court found that the oil polluted beaches were permanently damaged, then the amount of damage would be the difference in the market value of the property before and after damage.[69]

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[58] *Id.*

[59] Prosser, *supra* note 33, § 13.

[60] *Id.*

[61] *Id.*

[62] *Id.* § 13 at 68.

[63] *Id.* at 69; "Any physical entry upon the surface of the land is a trespass, whether it be by walking upon it, flooding it with water, casting objects upon it, or otherwise."

[64] Burns, *supra* note 46, at 200.

[65] Keirn v. Warfield, 60 Miss. 799 (1883).

[66] Clark v. Hart, 3 So. 33 (Miss. 1887).

[67] Lohne, *supra* note 5, at 61 & n.110.

[68] Chevron Oil Co. v. Snellgrove, 175 So. 2d 471 (Miss. 1965).

A trespass action offers the injured landowner a good possibility for recovery, but in many cases the defendant will be able to defeat that action by showing that the escape of oil was purely involuntary, involving no element of intent or negligence on his part.[70]

C. *Action for Negligence*

Recovery for the tort of negligence is a relatively new idea when compared with remedies such as trespass or nuisance.[71] Around 1825, negligence became recognized as a separate and independent basis of tort liability.[72]

It should be noted that negligence may constitute grounds for a trespass action, and the result of a negligent act may give one a right to sue for a nuisance, but in the context of the present discussion, negligence is dealt with as a separate, independent basis of tort liability.[73]

The traditional elements that must exist before tort liability for negligence will lie are: (a) a duty recognized by law which requires one to "conform to a certain standard of conduct for the protection of others against unreasonable risks," (b) a breach of that duty, (c) proximate cause, otherwise known as the causal connection between conduct and a resulting injury, and (d) damage or loss resulting to another.[74]

In order for the injured property owner to recover damages under negligence for oil pollution to his property he must prove the above four elements of the tort.[75] The plaintiff would have to show that the defendant had knowledge or should have had knowledge that his activity would cause harm to the plaintiff, and more importantly, that the defendant failed to take the steps a reasonable man would have taken to avoid injury to the plaintiff.[76]

The tort of negligence is considered by some writers to be the best legal theory available to a landowner in an oil pollution suit.[77] However, there exists one major roadblock to recovery for the tort of negligence. The proof of causal connection is next to impossible.[78] As is the case with trespass and nuisance, the landowner must prove not only that oil has covered his beach-front property, but also that the same oil came from Ship X.[79] This requirement of proof defeats most negligence tort actions brought for oil pollution of private beaches. The landowner is able to prove that his beaches are covered with oil, but not whose oil it is.[80]

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[69] *See e.g.,* Waggener v. Leggett, 246 Miss. 505, 150 So. 2d 529 (1963).

[70] Burns, *supra* note 64, at 200.

[71] PROSSER, *supra* note 33, § 28.

[72] *Id.* at 143.

[73] *Id.*

[74] *Id.* § 30 at 146.

[75] *See, e.g.,* Clark v. Gilmore 213 Miss. 590, 57 So. 2d 328 (1952).

[76] Burns, *supra* note 64, at 200.

[77] Shutler, *supra* note 10, at 415; Comment, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish,* 23 ALABAMA L. REV. 100 (1970).

This problem of proving causal connection in negligence torts may be solved within the next few years. Attempts have been made to develop a system for "fingerprinting" oil so that subsequent analysis of oil from a spill could reveal the identity of the polluter.[81] Two such systems, one using radioactive materials and the other using metals or metal-organic compounds have been used, but have not proven satisfactory because they interfered with some stages of processing and use of oil.[82] A new system has been developed called the "Organic Electrophore System" in which organic compounds known as electrophores are used to produce a type of code.[83] This system may prove to be the best ever devised for use in tracing oil. The desirability of putting this system to work has been stated in this manner:

> [T]he Organic Electrophore System offers promise as an active tagging system useful in the enforcement against and prevention of oil spills. The extremely low concentration of relatively stable yet harmless compounds, their easy detection and wide variety for coding purposes point up the desirability of putting such a system into wide-spread use.[84]

If this system, or one similar to it, were put into effect worldwide, the problem of proving causal connection would disappear, and an action based on negligence tort would offer one of the best methods of recovery to be found in the oil pollution area.

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[78] Shutler, *supra* note 10, at 437, 438.

[79] Comment, *Oil and Oysters Don't Mix: Private Remedies for Pollution Damage to Shellfish, supra* note 77, at 104.

[80] Sweeney, *supra* note 5, at 173.

[81] R. Landowne and R. Wainright, *A Chemical Tagging System for Use in the Prevention of Oil Spills,* PROCEEDINGS OF THE JOINT CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS, 179 (1971). This "fingerprinting" involves a process whereby traceable chemical elements are injected into the oil before it is placed aboard tankers, thus providing a means of identification of the oil in case of a spill.

[82] *Id.* at 180.

[83] *Id.*

[84] *Id.* at 182.

D. Action for Nuisance

The term "nuisance" embodies two separate theories of law, private nuisance and public nuisance.[85] A private nuisance is a disturbance or interruption of rights in land that may be remedied through civil action by the landowner whose rights have been disturbed.[86] A public nuisance, on the other hand, is a species of criminal offenses created for interference with certain rights of the community at large. Public nuisances are normally abated only by elected officials.[87]

It is important to note that nuisance is a separate field of tort liability "rather than a type of tortious conduct."[88] It is not concerned with the act or omission which has caused the plaintiff damage, rather it concerns the interests in land that are invaded and the damage or harm done to the land.[89]

The Supreme Court of Mississippi has defined a nuisance to be:

> [T]hat class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.[90]

One should also note the distinction between nuisance, trespass and negligence. A trespass is a direct physical invasion of the land, whereas a nuisance is merely an interference with the use and enjoyment of land involving no invasion of the land proper.[91] It is difficult to draw practical distinctions between negligence and nuisance because "negligence is merely one type of conduct which may give rise to a nuisance."[92]

There are three bases upon which liability for a nuisance may be predicated.[93] One may be liable for an intentional interference with the plaintiff's property interest, or a negligent interference, or for an abnormally dangerous activity carried on in an inappropriate place (strict liability).[94]

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[85] PROSSER, *supra* note 33, § 86.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 573.

[89] *Id.*

[90] Young v. Weaver, 202 Miss. 291, 299, 32 So. 2d 202, 205 (1947).

[91] GINDLER, WATER POLLUTION AND QUALITY CONTROLS § 210.3 (1967).

[92] PROSSER, *supra* note 33, § 87 at 574.

[93] *Id.*

[94] *Id.* § 87.

In order to be an actionable nuisance, both public and private nuisance doctrines require a showing of substantial interference with the plaintiff's property rights. Both require the interference to be an unreasonable one in the light of the surrounding circumstances. The standard of substantial interference and/or reasonableness of the interference is measured by the hypothetical "reasonable man" standard.[95]

A littoral landowner whose beaches have been polluted by oil may be able to recover damages under public nuisance theory. As noted, a public nuisance is one that affects the community as a whole rather than individual members of the community. It is normally abatable only by a public official acting for the community.[96]

Where a private landowner can show damages different in kind rather than in degree caused by a public nuisance, he may maintain a private action for such public nuisance.[97]

In Mississippi this theory was stated by our Supreme Court in *Pearman v. Wiggins,* wherein the court said:

> To abate a public nuisance, the public authority must move. A private action, either at law or in equity, will not lie, unless the plaintiff has sustained some special damage. The complainant must sustain a special or peculiar damage—an injury distinct from that done to the public at large.[98]

Any large oil spill from a vessel will cover substantial amounts of public and private beach-front property. Since large amounts of property are involved, the nuisance will take on the character of a public nuisance which means that the injured landowner, in order to maintain a private civil action for the public nuisance, must show injuries different in kind and not merely degree from that suffered by the general public.[99] The landowner will find it difficult to distinguish his damage from that of the public in general, illustrating rather ironically that in nuisance law the more widespread the injury to land from oil pollution, the less likely are the chances for private damages through a nuisance action.[100]

If the landowner is able to show "special or peculiar damage" different from that suffered by the public as a whole, then he will be able to recover damages for oil pollution to his land through a private action for a public nuisance.[101]

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[95] *Id.*

[96] *Id.* § 86.

[97] *Id.* § 88 at 587.

[98] 103 Miss. 4, 12, 60 So. 1, 3 (1912).

[99] Burns, *supra* note 64, at 195.

[100] Burns, *supra* note 64, at 195, 196.

A private nuisance is an interference with the use and enjoyment of an individual's land.[102] It may constitute an interference with the physical condition of the land or it may "consist of a disturbance of the comfort or convenience of the occupant. . . ."[103] Additionally it may affect the health and welfare or peace of mind of the individual occupying the land.[104]

It is possible that small quantities of oil from a vessel might reach the Mississippi coast and pollute only a limited number of beaches. When, and if, this situation occurs, the individual whose beach is polluted will have the right to maintain a private nuisance action for damages. In such an action, the landowner would need to base his case on either negligence, an intentional act, or strict liability for ultrahazardous activity.[105] He would have to prove a substantial interference with the use and enjoyment of his land that was unreasonable under the circumstances.[106] In the oil pollution case where damage is limited to the beaches of a few individuals, an action for private nuisance appears to be the best remedy available to the landowner.

Once the injured landowner has proven the existence of a nuisance, he has three possible remedies available to him. He may seek injunctive relief or damages, or he may abate the nuisance through self-help.[107] Recovery of damages appears to be the only remedy which will be of use to the landowner in an oil pollution suit based on nuisance. Since most vessel oil spills are one time events,[108] injunctive relief will be of no benefit. Abatement by self-help is likewise useless to the injured landowner, where his beach has been polluted by oil from a sea-going vessel.[109]

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[101] Pearman v. Wiggins, 103 Miss. 4, 60 So. 1 (1912).

[102] PROSSER, *supra* note 33, § 86.

[103] PROSSER, *supra* note 33, § 89 at 592. *See also,* Love Petroleum Co. v. Jones, 205 So. 2d 274 (Miss. 1967); Young v. Weaver, 202 Miss. 291, 32 So. 2d 202 (1947); American Sand and Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938).

[104] *See* Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933) (health and welfare); May v. Upton, 233 Miss. 447, 102 So. 2d 339 (1958) (peace of mind).

[105] PROSSER, *supra* note 33, § 87.

[106] *Id.*

[107] *Id.* § 90 at 602.

[108] EDWARDS, *supra* note 1. Injunctive relief is tailored for the situation where a continuous nuisance exists.

[109] PROSSER, *supra* note 33, § 90. Abatement by self-help is the theory which allows one to enter the lands of another personally to abate a nuisance when an emergency situation exists.

The amount of damages recoverable for oil pollution on privately owned beaches will depend upon whether the damage is temporary or permanent.[110] If the court finds that oil pollution of a beach permanently diminishes the value of the land, it will award damages equivalent to the diminution of the market value of the property.[111] On the other hand, the court may decide that oil pollution does not permanently injure the beach. In that case, the damages awarded would be equivalent to the diminution in the rental or usable value for the period of pollution.[112]

In addition to actual damage to land, the plaintiff in a suit for nuisance arising out of oil pollution may be allowed to recover all special damages resulting from personal inconvenience and danger to the health of himself and his family.[113]

The theory of recovery for special damages in nuisance cases was succinctly stated by our Supreme Court in *City of Oxford v. Spears,* as follows:

> [T]he landowner is entitled to recover such special damages he may be able to prove. These special or incidental damages are elements of damage separate, distinct, and independent of the depreciation of the value of the property or of the depreciation of the rental or usable value of the property. Included in the category of special or incidental damages are annoyance, discomfort, inconvenience, and sickness. . . . There may be others.[114]
>
> The landowner may also recover any reasonable expenditures he has made because of the existence of the nuisance.[115]

IV. FEDERAL LAWS AND THE PRIVATE LITIGANT

Of major importance in the oil pollution area are the federal statutes passed to deal with water pollution. One who represents a littoral landowner whose beaches have been fouled with oil should examine these statutes carefully in order to ascertain whether they will be useful in any anticipated action. The federal acts that should be examined include, The Rivers and Harbors Act of 1899,[116] The Outer Continental Shelf Lands Act,[117] The Federal Water Pollution Control

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[110] *See* Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954).

[111] *See* City of Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956).

[112] *Id.;* Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954).

[113] City of Meridian v. Tingle, 226 Miss. 317, 84 So. 2d 388 (1956).

[114] City of Oxford v. Spears, 228 Miss. 433, 439, 87 So. 2d 914, 916.

[115] PROSSER, *supra* note 33, § 90 at 603.

[116] 33 U.S.C. §§ 401-413 (1971).

[117] 43 U.S.C. §§ 1331 *et seq.* (1971).

Act,[118] The Water Quality Improvement Act of 1970,[119] and The National Environment Policy Act of 1969.[120]

These acts present one with a veritable maze of agencies, departments and authorities with which he may be required to deal. To name a few, one might be required to talk with representatives of the Water Quality Office of the Environmental Protection Agency; the Corps of Engineers, Department of the Army; the United States Coast Guard, Department of Transportation; the Fish and Wildlife Service, Department of the Interior; the United States Geological Survey, Department of the Interior, and state and local pollution control boards.[121]

A. The Rivers and Harbors Act of 1899

Section 13[122] of the Rivers and Harbors Act of 1899 is called the Refuse Act of 1899. It was designed to prevent obstructions of navigation but has been used with increased frequency as a key tool in the fight against oil pollution.[123]

The Act prohibits the discharge of any refuse matter from or out of any ship, barge, or other floating craft, or from shore, wharf, manufacturing establishment or mill, into the navigable waters of the United States. Excepted from the terms of the act is refuse flowing from streets and sewers and passing therefrom in a liquid state into navigable waters of the United States. In addition to the prohibitions against direct discharge of refuse into navigable waters, it also prohibits the placing of refuse on the banks of navigable streams or waters where it could possibly be washed into the navigable waters of the United States.[124]

Violations of the Refuse Act are treated as misdemeanors carrying a fine of from $500.00 to $2,500.00 and/or imprisonment for up to one year.[125] There is a provision in the Act whereby one who gives information leading to a conviction may recover one-half of any fine levied by the court.[126] There is no requirement to show intent or scienter on the part of the defendant under this Act,[127] and the Refuse Act will be construed liberally even though it is a criminal statute.[128]

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[118] 33 U.S.C. § 1151 (1971).

[119] *Id.* § 1161, *amending* 33 U.S.C. § 1151 (1964).

[120] 42 U.S.C. § 4321 (1971). This Act was passed by Congress in 1969 to insure that the federal government balances short term benefits against long term detriments in any government project affecting the environment. For a discussion of this Act *see,* Burns, *supra* note 64, at 191-92; Retize, *supra* note 45, at 814.

[121] Keener, *Federal Water Pollution Legislation and Regulations with Particular Reference to the Oil Industry,* 4 NATURAL RESOURCES L. 484, 485 (1971).

[122] 33 U.S.C. § 407 (1971).

[123] Tell, *Summary of Laws and Regulations Governing Spills and Discharges of Oil,* PROCEEDINGS OF JOINT CONFERENCE ON PREVENTION AND CONTROL OF OIL SPILLS, 3, 5 (1971).

[124] 33 U.S.C. § 407 (1971).

[125] *Id.* § 411.

Some other general observations about the Refuse Act may be made as follows: (1) "Refuse" has been extended by case law to mean commercially valuable oil or gasoline if it is found upon the Navigable Waters of the United States.[129] (2) Injunctive relief in a civil action is available for use by the federal government under the Refuse Act whereas it would not be available under the Water Quality Improvement Act of 1970.[130]

It is doubtful that this Act will be of value to the attorney looking for a remedy for his client whose beaches, boats, docks and other property have been polluted by oil. The Act is criminal in nature, giving only to the United States Government the civil remedy of injunction in an appropriate case.[131] It is possible for the landowner to recover one-half of the fine levied if he furnishes the information which results in a conviction of the polluter, but the likelihood of his ever possessing such information appears remote.[132]

B. The Outer Continental Shelf Lands Act

Although this paper is limited primarily to the remedies a private landowner may have for oil pollution caused by vessels, it will be necessary to examine the Outer Continental Shelf Lands Act[133] in order to obtain a broad spectrum view of the oil pollution field. This Act, along with Department of the Interior regulations promulgated pursuant to it, deals with oil exploration of the contiguous zone.[134] It may be that oil which washes onto Mississippi beaches comes from an off-shore oil rig instead of a tanker. If so, then that landowner is in a much better position than one whose property is injured by vessel oil pollution. Why? Simply because the recent catastrophic California and Louisiana oil spills have caused drastic changes in Department of the Interior Regulations in the area of cleanup.

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[126] *Id.*

[127] KEENER, *supra* note 121, at 500; United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

[128] United States v. Republic Steel Corp., 362 U. S. 482 (1960).

[129] United States v. Standard Oil Co., 384 U. S. 224 (1966).

[130] Tell, *supra* note 123, at 5.

[131] United States v. Republic Steel Corp., 286 F.2d 875 (6th Cir. 1961).

[132] *See* Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution,* 58 CALIF. L. REV. 1444, 1459-65 (1970), wherein the author discusses two highly tenous methods of recovery under this statute — a *qui tam* action, and a tort action.

[133] 43 U.S.C. § 1331 (1971).

[134] The contiguous zone is "the area seaward from the boundary of state ownership to the 12 mile limit." Tell, *supra* note 123, at 5.

One writer has explained the new regulations as follows:

> On February 17, 1969, the Secretary promulgated further regulations setting forth in greater detail the responsibility of lessees for the cost of cleanup and for damages from oil pollution resulting from operations under the act. The new regulations, written after the Santa Barbara incident of January 28, 1969, require the operator of the lease to clean up the pollutant, however occurring, and upon his failure to do so, the federal, state or local Governments may, at the expense of the lessee. This is liability without fault, and without limitation as to the amount of such liability.[135]

The regulations promulgated by the Secretary of the Interior will be of great benefit in a pollution suit for oil damage to private property. Section 250.43 (b) provides in part: "If the waters of the sea are polluted by the drilling or production operations conducted by or on behalf of the lessee, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant, wheresoever found, proximately resulting therefrom shall be at the expense of the lessee."[136]

Additionally, the new regulations specifically preserve existing remedies that may be found under state law. At § 250.43 (c) the regulations state, "The lessee's liability to third parties, other than for cleaning up the pollutant in accordance with paragraph (b) of this section shall be governed by applicable law."[137] Thus the private landowner whose land is polluted by oil from an off-shore well within the jurisdiction of the Outer Continental Shelf Lands Act may hold the lessee strictly liable for all cleanup costs and, at the same time sue for damages under the common law remedies discussed earlier.

C. *The Federal Water Pollution Control Act*

The Federal Water Pollution Control Act was passed by Congress to give uniform control over all forms of pollution. It has been amended at various times, including major revisions in 1965[138] and 1970.[139]

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[135] Lohne, *supra* note 67, at 60.

[136] 30 C.F.R. § 250.43 (b) (1971).

[137] *Id.* § 250.43 (c).

[138] In 1965, the Water Quality Act was added to this title. It required each state to establish its own water quality standards subject to federal approval. Under it, the states were given the primary responsibility for controlling pollution of water; 33 U.S.C. §§ 1151 *et seq.* (1971).

[139] Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161 *et seq.* (1971); dealing specifically with pollution of the seas by oil.

The declared purpose of Congress in passing this Act was, "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."[140]

In passing the Water Quality Act of 1965, amending the Federal Water Pollution Control Act, the Congress, however, instead of establishing a national policy of uniformity in the pollution area, gave to the states the primary responsibility in preventing and controlling water pollution.[141] Each state was required to establish water quality standards of such nature as to protect the public health or welfare.[142] It is readily apparent that such standards will be general in nature, and will be unlikely to apply to specific substances such as oil.[143]

The deficiencies of this 1965 amendment in the oil pollution area have been pointed out as follows:

> In addition to the absence of precise standards, federal enforcement is limited to situations where the discharge has caused a reduction in the quality of the receiving waters below the standards set for that water body, or has polluted the waters to the extent that it endangers the public health or welfare. In the latter case, extended conference and hearing procedures must be complied with before a lawsuit to abate the violation can be commenced.[144]

It should further be noted that although the establishment of water quality standards and their enforcement is a very effective way of preventing pollution of a continuing nature, it will not prove satisfactory for single isolated acts of pollution. The period of time allowed between violation and abatement is too long to be of use in the isolated pollution case where remedial action must be taken swiftly.[145]

D. The Water Quality Improvement Act of 1970

In 1970 Congress declared that oil had such a potential to pollute the waters of the United States that is should be regulated by specific legislation. Thus, the Water Quality Improvement Act of 1970[146] was passed, amending the Federal Water Pollution Control Act[147] in so far as pollution by oil was concerned. This Act is by far the most stringent ever passed by Congress to deal with pollution by a single substance.

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[140] 33 U.S.C. § 1151 (a) (1971).

[141] *Id.* § 1151 (b).

[142] *Id.* § 1160 (c) (3).

[143] Tell, *supra* note 123, at 4.

[144] *Id.*

[145] Edwards, *supra* note 1, at 24.

[146] 33 U.S.C. § 1161 (1971).

[147] *Id.* §§ 1151 *et seq.*

A detailed analysis of this Act is beyond the scope of this paper,[148] but several of its important provisions should be noted. It reiterates Congress' determination "that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[149]

"Harmful quantities" of discharged oil under the Act have been defined by the Secretary of the Interior to mean that amount of oil which when discharged will (a) violate applicable water quality standards or (b) cause a film or sheen upon or discoloration of the water surface or adjoining shorelines, or cause sludge deposits under the water or upon adjacent shorelines.[150]

The Act makes provisions for a National Contingency Plan for the cleanup and removal of discharged oil.[151] In the event of marine disasters which create a substantial threat of pollution by oil, the United States, under this Act, can remove or eliminate the potential pollution hazard; even to the extent of destroying ships and other marine craft.[152]

The major provision[153] of the Act relates to the cleanup of oil pollution. Under section (f) of this act, the owner or operator of a vessel, onshore facility, or offshore facility is *strictly liable* for the clean up costs incurred by the United States Government, unless he can show that he comes under one of the four stated exceptions found in the act. Only if such owner or operator can show that the discharge of oil was solely caused by (1) an act of God (2) an act of war (3) negligence on the part of the United States Government or (4) an act or omission of a third party, or any combination of the above, may he absolve himself from liability to the United States Government for cleanup costs.[154] In the case of an offending vessel, liability for cleanup is to be in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser.[155]

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[148] This Act has been examined in depth by the following: Lohne, *supra* note 5. Keener, *supra* note 121.

[149] 33 U.S.C. § 1161 (b) (1) (1971).

[150] *Id.* § 1161 (b) (3). This section authorizes the President to determine what constitutes "harmful discharges." This was delegated to the Secretary of Interior, who published regulations concerning such "harmful discharges" at 35 Fed. Reg. 14307 (1971).

[151] 33 U.S.C. § 1161 (c) (1971).

[152] *Id.* § 1161 (d).

[153] *Id.* § 1161 (f).

[154] *Id.*

[155] *Id.*

While the Water Quality Improvement Act of 1970 does not give to the private landowner any additional remedies, it provides such strong cleanup penalties for violations, it may serve as a deterrent to oil pollution. Additionally, the cleanup provisions will probably benefit the private landowner as well as the publicly owned beaches because in its cleanup operations the federal government will, in most instances, clean up all oil polluted beaches without regard to whether the land is publicly or privately owned.[156]

The Act does not modify any existing liability for oil discharge, removal or damages which the private property owner might have either by state statute or by common law.[157] It is apparent, therefore, in regard to damage to privately owned beach front property by oil pollution, that the prior discussion of the remedies of trespass, nuisance and negligence will be applicable at this juncture.

V. Proposed State Law

The inability of Mississippi pollution laws to cope with oil spills has been noted earlier.[158] We have no State law adequately regulating cleanup or liability for damage in coastal oil spill cases; consequently we turn the matter over to the United States Coast Guard.[159]

It is submitted that the present state of Federal law, while adequately protecting the national interest in the oil pollution field, is inadequate in that it gives no statutory rghts to an injured landowner to sue for oil pollution damage to his land. The inadequacies in federal law have been remedied in at least four coastal states. These states, Florida, Maine, Massachusetts and Washington have passed legislation complementing and supplementing Federal law.[160] These acts fill in the gaps left by federal law, including provisions specifically providing for recovery of damages by landowners whose beaches have been polluted by oil.

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[156] Lohne, *supra* note 67, at 61.

[157] 33 U.S.C. § 1161 (o) (1) (1971) states: "Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any on-shore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil." *Id.*

[158] Penn, *supra* note 44.

[159] *Id.*

[160] Florida Oil Spill Prevention and Pollution Act, Fla. Stat. Ann. § 376.011 *et seq.* (Supp. 1971); Maine Oil Discharge Prevention and Pollution Control Act, 16 Me. Rev. Stat. §§ 541 *et seq.* (1971); Massachusetts Clean Waters Act, Mass. Ann. Laws ch. 21, § 27 (1971); Washington Water Pollution Control Act, Wash. Rev. Code § 90.48 (Supp. 1971).

All four of these acts provide for strict liability, without proof of negligence, for reimbursement to the state of cleanup costs, as well as for damages to third parties and the environment.

The constitutionality of such legislation is presently under attack in suits challenging the Florida and Maine statutes, and enforcement parts of each act have been restrained pending outcome of the suits.[161]

The Legislature should watch carefully the results of this litigation. With the experience of these four states before it, our Legislature should be able to draft a statute that meets federal constitutional requirements while providing the coastal landowner with statutory rights for recovery of oil damage to his land.

VI. CONCLUSION

Since there have been no major oil spills directly affecting the Mississippi Gulf Coast, one may be lulled into a sense of complacency about the adequacies of existing pollution law. It is only reasonable to assume, however, that the growth in the volume of oil transportation by vessels, along with the increase in the size of such vessels, pose a definite possibility of oil spillage off the Mississippi Gulf Coast, whether in large or small amounts.

From an examination of the federal legislation concerning pollution, one can see that the cleanup problem of oil pollution is disposed of by the Water Quality Improvement Act of 1970 and the Outer Continental Shelf Lands Act.

Recovery of damages by the injured landowner is another matter. Existing state law is inadequate to deal with the problem of damages for coastal oil pollution. Presently, in order to recover damages for oil pollution, one must maintain an action for trespass, nuisance or negligence. Each of these actions has its shortcomings. If one maintains a negligence action he must prove causal connection. In maintaining a trespass action, one must show intentional or negligent acts on the defendant's part in order to recover. If an action is based on nuisance theory, one must prove the existence of a private nuisance rather than a public nuisance, or if he seeks recovery in a private action for a public nuisance, he must show damages different in kind rather than degree. While all three of these actions provide possible means for recovery of damage for oil pollution, nuisance theory appears to be the best insofar as recovery of damages for injury to land. Moreover, under nuisance theory, one may also recover such special damages as he is able to prove.

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[161] Tell, *supra* note 123, at 7.

The common law actions of trespass, negligence and nuisance should be supplemented by a new state law patterned after those of Maine, Massachusetts, Florida, or Washington. Mississippi, like the above mentioned coastal states, should hold oil polluters strictly liable to coastal landowners for damage to their private property rights.

Mike Soper

RECENT DECISIONS

CONSTITUTIONAL LAW—STANDING—ALLEGATIONS OF DIRECT INJURY ARE REQUIRED TO ESTABLISH STANDING IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

Petitioner, a conservation and ecology oriented membership corporation, sought an injunction preventing federal officials from issuing a permit to Walt Disney Enterprises, Inc. for the development of a commercial-recreational facility in the Sequoia National Park. Petitioner Sierra Club relied upon § 10 of the Administrative Procedure Act[1] as the impetus of the action, basing it's allegations of injury on the theory that this constitutes a "public" action concerning the preservation of natural resources; therefore, the principles upon which the club was founded qualified it as a representative of the public. The federal district court in granting the preliminary injunction rejected the respondents' contention that the petitioner lacked standing. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that the Sierra Club had failed to establish standing and irreparable injury.[2] On writ of certiorari the United States Supreme Court, *held,* affirmed. The Administrative Procedure Act requires that in order to achieve standing for judicial review, allegations of a direct or prospective interest, whether economic or otherwise, be sufficiently established. *Sierra Club v. Morton,* 405 U.S. 727 (1972).

The law surrounding the "standing" of a person to sue, has been developed primarily through judicial decisions rather than by statute.[3] Traditionally, the law of standing has been composed of three elements.[4] A person, to have standing, must show that the constitutional requirement of case or controversy[5] has been satisfied, and he must have sufficient interest in the "case or controversy" to assure an adversary context.[6] The party must also have more than a general interest in the alleged wrong[7] and show an invasion of his legal rights or privileges.[8] The reasoning behind these requirements is to insure that only those persons with a genuine and legitimate interest can participate in a proceeding. Standing, thereby, focuses not upon the issues that the party is seeking to adjudicate, but whether the party qualifies as the proper party to request an adjudication of the particular issue. The doctrine of standing has long been considered one of the most amorphous areas of the law, yet recent decisions have provided more clarity and liberalization.[9] The trend toward liberalizing the requirements for standing began when the Court in *Flast v. Cohen*[10] utilized "injury in fact" as the criteria as opposed to the past requirement of "legal interest." Confusion in the area of administrative law has resulted in an attempt to determine if an assertion of an adverse effect is sufficient to establish standing to attack an alleged illegal administrative action. In an attempt to resolve this question, two views have been advanced.[11] Damage to a legal right is the traditional test for establishing standing.[12] Legal right is a broad term encompassing such areas as property rights, contract rights, statutory rights,[13] and constitutional rights.[14] The other view reflects a more liberal approach and requires only that an "injury in fact" be alleged by the plaintiff notwithstanding whether the injury is to a legal right.[15] It should be noted that the courts, in previous decisions,[16] have granted standing to group or individual plaintiffs under the theory that they were "private attorney generals" suing in the public interest. The court in *Associated Industries v. Ickes*[17] justified this theory on the premise that since Congress can constitutionally authorize a government official to bring a proceeding where a justifiable controversy exists, so may Congress, by statutory enactment, authorize a non-official person to bring suit to prevent an officer from violating his statutory powers, for in such instances, a controversy likewise exists. In the area of environmental concern and administrative law, the question of standing has frequently arisen in recent years. Although a rapidly developing area, administrative law is still in its formative stage. As such, standing to appeal an administrative decision is a relatively recent problem.[18] Nevertheless, in recent years the Supreme Court has rendered several enlightening opinions pertaining to standing in challenges to federal administrative action taken under a statute. These opinions have reflected a trend expanding the class of people who may protest administrative action by providing that a "party in interest" or any party "adversely affected" or "aggrieved" by an administrative act may have standing to sue.[19] The epitome of these decisions was reached when the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*[20] defined the implications of § 10 of the Administrative Procedure Act.[21] In this case the Court rejected the "legal right" test, relied upon by the lower court, holding that it went to the merits rather than the question of standing. The rejection of this test was supplanted by a two prong test that allowed standing (1) where the plaintiff alleged injury in fact, economic or otherwise[22] resulting from the challenged action, and (2) where the interest sought to be protected or regulated was arguably within the scope of the statute or constitutional guarantee in question.[23] It should be noted, however, that "injury in fact" is the only constitutional requirement for standing that the Court has recognized. Any other requirement for standing falls within the framework of judicial construction subject to rejection through the exercise of judicial discretion. The question concerning the Administrative Procedure Act most frequently confronting federal courts has been whether a person, as public representative, has standing to challenge agency action. Many of these questions have centered upon whether a private individual, association, or organization has standing to seek injunctive relief against alleged environmental harm to public parks, recreation areas, or wildlife refuges caused by commercial or governmental developments. Some of the lower federal courts have granted standing in such instances and justify their actions by the liberal views of standing espoused by the Supreme Court.[24] These courts, by conferring standing, have not always been explicit in enunciating that the plaintiff was "adversely affected" by agency action or "aggrieved" within the meaning of a relevant statute. Yet, compliance with these requirements has been evident in the facts or opinions of the particular case.[25] On the other hand, conservationist organizations have been denied standing to sue for injunctive relief where they have founded their allegations on nothing more than the preservation of the area in question however laudable such goals might be.[26]

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[1] 5 U.S.C. § 702 (a) (1970) reads as follows: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[2] Sierra Club v. Hickle, 433 F.2d 24 (9th Cir. 1970), *cert. granted,* 401 U.S. 907 (1970).

[3] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 502 (1965).

[4] *See, e.g.,* Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

[5] U.S. CONST. art. III, § 2. *See, e.g.,* Tileston v. Ullman, 318 U.S. 44 (1943); Frothingham v. Mellon, 262 U.S. 447 (1923). The "case or controversy" requirement is concerned not only with standing but also with *political questions,* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); *mootness,* California v. San Pablo & T.R.R., 149 U.S. 308 (1893); *ripeness,* Poe v. Ullman, 367 U.S. 497 (1961); *advisory opinions,* Muskrat v. United States, 219 U.S. 346 (1911); and, *the policy against friendly or collusive suits,* Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892).

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[6] *See, e.g.,* Baker v. Carr, 369 U.S. 186 (1962). The Court stated:

"The gist of the question of standing" was whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Id.* at 204.

[7] *See, e.g.,* Massachusetts v. Mellon, 262 U.S. 447 (1923).

[8] *See, e.g.,* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[9] Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450.

[10] 392 U.S. 83 (1968).

[11] JAFFE, *supra* note 3, at 501.

[12] *See, e.g.,* Hardin v. Kentucky Util. Co., 390 U.S. 1, 5-6 (1968); Stark v. Wickard, 321 U.S. 288 (1944); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

[13] Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939).

[14] *See* Flast v. Cohen, 392 U.S. 83 (1968).

[15] *See* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[16] *See, e.g.,* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied,* 400 U.S. 949 (1970).

[17] 134 F.2d 694 (2d Cir. 1943).

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[18] Chipley, *Environmental Law—Standing to Sue,* 6 LAND & WATER L. REV. 527 (1970).

[19] Note, *Administrative Law—Standing to Challenge Administrative Actions—Anyone Arguably Protected by Statute May Sue,* 23 VAND. L. REV. 814, 817 (1970).

[20] 397 U.S. 150 (1970).

[21] 5 U.S.C. § 702 (1970).

[22] *See* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966). The Court stated that the interest sought to be protected may reflect aesthetic, conservational, and recreational values as well as economic ones.

[23] *See* Barlow v. Collins, 397 U.S. 59 (1970); *accord,* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970).

[24] *See* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); Office of Communication of Ltd. Church of Christ v. FCC, 359

In the instant case, the Court held that the Sierra Club failed to allege sufficient interest in the Mineral King Valley to render the organization "aggrieved" or "adversely affected" within the meaning of the Administrative Procedure Act. The Court stated that the alleged ecological harm could constitute an "injury in fact" sufficient to meet the qualifications for standing as outlined in § 10 of the Administrative Procedure Act. Yet, the Court concluded that the Sierra Club's concern for aesthetic and environmental well-being constituted little more than an injury to a cognizable interest. This, the Court stated, was insufficient to meet the "injury in fact" test, which requires that the party seeking review be among those injured. The Court observed that the Sierra Club had failed to assert that either it or its members would be directly injured by the Disney development. The Sierra Club, however, based its entire action upon the theory that this was a "public action" for the preservation of the natural resources and that its long and active participation in this area duly qualified it as a "representative of the public." This, the Court concluded, reflected a misunderstanding of the cases[27] involving "public actions" in the administrative law area. These cases required an allegation of "injury in fact" to establish standing for judicial review and that once this is established the plaintiff may argue the public interest in support of the alleged statutory violation by the agency. The Court observed that while the trend of recent cases arising under the Administrative Procedure Act expanded the categories of injury required in support of standing, this expansion does not justify abandonment of the precept that the person seeking review must personnally be injured. Thus the Court concluded that the Administrative Procedure Act requires that a person have a more direct interest than a mere concern in the problem, regardless of duration of concern and the qualifications of the organization evaluating the prob-

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F.2d 994 (D.C. Cir. 1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967). *Contra,* Sierra Club v. Hickle, 433 F.2d 24 (9th Cir. 1970), *cert. granted,* 401 U.S. 907 (1970).

[25] *Accord,* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 1971); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970).

[26] *See, e.g.,* Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied,* 402 U.S. 908 (1971); Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971).

[27] *See* Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

lem, in order to establish standing for the purpose of judicial review of administrative action.[28]

The decision explicitly points out that no special treatment will be accorded conservation groups in their fight to preserve the environment. The Court appeared reluctant to change the present status quo of standing. Such a change, however, would not be anomalous for a radical departure occurred approximately four years previously in *Flast v. Cohen*.[29] Yet the Court's decision in the instant case outlined with clarity the requirements that a "public interest" organization must meet to establish standing in actions regarding environmental protection. These standards reflect nothing new but rather constitute little more than a restatement of the requirements established in *Data Processing*.[30] As a consequence, groups such as the Sierra Club will not be able to gain access to federal court simply because they represent a large number of people. This decision, therefore, blocks the trend toward a more liberal standing posture.[31] This decision will probably seriously handicap suits by ecological organizations motivated solely by the desire to preserve the natural environment. In actions of this nature, time is extremely important, since procedural delays may result in irreparable destruction of natural resources. This decision apparantly implies that standing might be established by joinder with local citizens.[32] This, however, is not feasible, for oftentimes the local citizen is too mesmerized by the immediate economic gains to see beyond the present. Few citizens are financially capable of litigating such extensive suits; however, organizations comprised of large memberships such as the Sierra Club have not only the capability but the know-how to litigate such actions. The executive branch, itself, may institute checks upon the relevant agencies. At present, a cabinet level committee in conjunction with those created by the National Environmental Policy Act[33] and by executive orders,[34] are responsible for reviewing agency action for compliance with national goals of environmental protection. A possible additional method of circumventing this roadblock created by the Court is legislation aimed at eliminating many of the legal obstacles to environmental oriented litigation.[35] Proposed legislation of this nature has appeared in several states, among them, Michigan, which in 1970, enacted the model law.[36] The substance of this law is to give any person or organization standing to sue any legal entity, including governmental agencies, for the protection of natural resources and to insure the maintenance of a healthy environment.[37] Similar bills have been introduced in both houses of Congress.[38] Thus, though the instant case represents a regressive movement in the liberalizing of standing requirements for conservation groups, it may well serve as the needed impetus for responsive action by the executive and legislative branches of the government.

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[28] In a dissenting opinion, Justice Douglas suggested that problem of standing in environmental cases could be circumvented by the passage of federal legislation providing litigation before federal agencies or federal courts in the name of the inanimate object about to be harmed or injured.

Justice Blackmun, in a dissenting opinion, stated he would reverse the judgment if the Sierra Club agreed to amend the complaint in the manner suggested by the majority opinion for establishing standing. Alternatively, he suggested amending the concepts of standing to allow well-meaning, established environmental organizations to litigate conservation/environmental issues.

[29] 392 U.S. 83 (1968).

[30] 397 U.S. 150 (1970); *accord,* Barlow v. Collins, 397 U.S. 195 (1970).

[31] Davis, *supra* note 9, at 450.

[32] *See* 71 COLUM. L. REV. 172, 177 (1971).

[33] 42 U.S.C. § 4321 (Supp. I, 1971). This Act created the Council on Environmental Quality.

[34] Exec. Order, No. 11472, 3 C.F.R. 459 (Supp. 1971) and Exec. Order, No. 11514, 3 C.F.R. 531 (Supp. 1971) created the Cabinet Committee on the Environment and the Citizens Committee on Environmental Quality. The general responsibilities of these and the Council on Environmental Quality are directed toward reviewing agency action and advising the President of the findings.

Joel D. Bunkley, III

CONSTITUTIONAL LAW—LOYALTY OATHS—OATH TO OPPOSE OVERTHROW OF GOVERNMENT DOES NOT VIOLATE FIRST AND FOURTEENTH AMENDMENTS; NO ADMINISTRATIVE HEARING REQUIRED WHEN OATH CONSTITUTIONAL

Appellee, a research sociologist, brought an action in federal district court to have a state loyalty oath statute declared unconstitutional and enjoin appellants[1] from requiring subscription to it. Hired by the Boston State Hospital, appellee was discharged when she refused to subscribe to a loyalty oath required of all public employees.[2] Appellee contended that the oath infringed upon her first amendment rights because of its vagueness, and that the statute violated the due process clause of the fourteenth amendment because it did not require a hearing prior to a determination not to hire because of a refusal to subscribe to the oath. The district court found the "oppose" clause unconstitutionally vague and granted the requested injunction.[3] On direct appeal to the United States Supreme Court, *held*, reversed and remanded. A state loyalty statute whereby public employees must, as a condition of employment, swear to support the Federal and State Constitutions and oppose the forceful, violent, illegal, or unconstitutional overthrow of the government, and which does not require a hearing prior to a determination to discharge, does not violate the first and fourteenth amendments. *Cole v. Richardson*, 92 Sup. Ct. 1332 (1972).

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[35] Chipley, *supra* note 18, at 533; *accord,* Cornwell, *From Whence Cometh Our Help? Conservationists' Search for a Judicial Forum for Environmental Relief,* 23 U. OF FLA. L. REV. 451.

[36] MICH. STAT. ANN. § 14.528 (202) (1971).

[37] Chipley, *supra* note 18, at 533.

[38] S.R. 3575, 91st Cong., 2d Sess. (1970); H.R. 16436, 91st Cong., 2d Sess. (1970).

[1] Superintendent of the Boston State Hospital and the Commissioner of the Department of Mental Health (the Commonwealth was also served with process and its Attorney General defended the suit).

[2] MASS. ANN. LAWS, ch. 264, § 14 (1968). Pertinent parts read:

> Every person entering the employ of the commonwealth or any political subdivision thereof . . . shall . . . subscribe to . . . the following oath or affirmation:—
>
> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional methods." *Id.*

Although loyalty oaths as a condition of public employment have been a part of this country's political life since its colonization,[4] only since World War II have they been extensively required and, consequently, given rise to frequent constitutional challenges.[5] Initially, the Court reasoned that states had a legitimate interest in insuring the individual and collective loyalty, competency, and integrity of public employees and that mandatory loyalty oaths were a reasonable means to do this.[6] There was no denial of first amendment rights because the prospective employee was merely required to make a choice.[7] Since this early experience, the Court has greatly restricted the permissible scope of loyalty statutes.[8] Because first amendment rights are involved, the principles of due process of law require that loyalty statutes be clearly and precisely constructed[9] and a strict standard of permissible statutory vagueness be applied.[10] Whenever either the construction of a statute or a narrow interpretation of its language lead to reasonable doubt as to its scope, it must yield to the due process void-for-vagueness doctrine.[11] A loyalty statute may constitutionally proscribe and sanction only that membership in subversive organizations which is with a knowledge of the organization's illegal purpose[12] and the specific intent to further that purpose.[13] Proscription of mere membership or mere knowing membership offends due process[14] and infringes on first amendment rights.[15] Advocacy which is intended to produce action to effect the illegal overthrow of the government, and which is likely to immediately produce such action may be proscribed by a loyalty statute and constitute a basis of disqualification or discharge,[16] but the mere discussion, teaching or abstract advocacy of the principles of illegal overthrow of government may not be proscribed as such would infringe upon first amendment rights.[17] Under no circumstances may one's mere beliefs be a

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[3] Richardson v. Cole, 300 F. Supp. 1321 (D. Mass., 1969). A three-judge panel is required by 28 U.S.C. § 2281 whenever an injunction is sought to prevent the enforcement of a state statute. 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court from decisions of three-judge courts.

[4] Asper, *The Long and Unhappy History of Loyalty Testing in Maryland,* 13 AM. J. LEGAL HIST. 97-102 (1969).

[5] R. BROWN, LOYALTY AND SECURITY 3 (1958). Apparently only one Supreme Court case prior to 1951 was decided in which the constitutionality of a state loyalty statute was at issue. Cummins v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (subscription to oath that affiant had not sympathized with or aided the Confederate States of America required before one considered competent to serve in public office declared unconstitutional).

[6] Garner v. Board of Pub. Works, 341 U.S. 716, 720-21 (1951).

[7] Adler v. Board of Educ. 342 U.S. 485, 493 (1952). The Court's reasoning in this case and in Garner v. Board of Pub. Works, 341 U.S. 716, 721 (1951) was in part, based upon the premise that public employment was a privilege, not a right. Adler v. Board of Educ., *supra* at 492; *accord,* Note, *Constitutional Law — Validity of Loyalty Oaths Required of State Employees,* 38 MISS. L. J. 321 (1967). (This note also discusses the Mississippi Subversive Activities Act, MISS. CODE ANN. §§ 4064-01 to -13 (1956), which, however, has since been declared unconstitutional. Haining v. Roberts, 320 F. Supp. 1054 (S.D. Miss. 1970)).

[8] Following *Adler,* the Court struck down every state loyalty oath it considered until Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd,* 390 U.S. 36 (1968), in which the Court considered its first "support" oath. It consistently added to the tests for constitutionality of loyalty oaths, evidencing a change in judicial attitude toward such statutes from that of approval to that of hostility. *Compare* Whitehall v. Elkins, 389 U.S. 54 (1967) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) *with* Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) and Garner v. Board of Pub. Works, 341 U.S. 716 (1951). *See generally* Comment, *Loyalty*

Oaths, 77 YALE L. J. 739 (1968); Note, *State Loyalty Programs and the Supreme Court,* 43 IND. L. J. 462 (1968); Comment, *The Loyalty Oath as a Condition of Public Employment,* 19 BAYLOR L. REV. 479 (1967).

[9] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); also discussed in Comment, 16 BUFFALO L. REV. 781 (1967).

[10] Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961); *accord,* Baggett v. Bullitt, 377 U.S. 360, 366-74 (1964).

[11] As stated in Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961), the applicable standard is that where "[a] statute . . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, [it] violates the first essential of due process of law."

For an informative discussion of vagueness and loyalty oaths, *see* Note, *The Use of the Void-for-Vagueness Doctrine to Invalidate State Loyalty Oaths,* 26 OHIO STATE L. J. 128 (1965).

[12] Wieman v. Updegraff, 344 U.S. 183 (1952), *noted in* 39 CORNELL L. Q. 118 (1953). There were indications in earlier cases that *scienter* was required, but there were no clear statements to that effect. *See* Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 56-57 (1951); Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951). *But see* Adler v. Board of Educ., 342 U.S. 485, 494-96 (1952).

[13] Elfbrandt v. Russell, 384 U.S. 11 (1966). The requirement for specific intent is derived from the "membership" cases under the Smith Act, 18 U.S.C. § 2385 (1965). *See, e.g.,* Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961). For a discussion of the specific intent requirement and loyalty oaths *see* Note, *The Requirement of Specific Intent — A Further Limitation on Loyalty Oaths,* 21 Sw. L.J. 684 (1967).

[14] Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

[15] Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).

[16] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 598-602 (1967).

[17] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 598-602 (1967).

basis for disqualification or discharge.[18] Recent cases have, for the first time, challenged oaths to support[19] or uphold[20] the Constitution. The Court has affirmed the constitutionality of such oaths stating that they are simple, direct, and unequivocal,[21] leaving no doubt that the obligation assumed is merely a recognition that the government is one of constitutional processes,[22] and, thus, imposing no restrictions on freedom of expression[23] or violating due process.[24] The law is unclear in regard to the necessity of an administrative hearing prior to disqualification from public employment for refusing to subscribe to a loyalty oath. On the one hand the Court has indicated that procedural due process does not require a hearing in the case of disqualification for failure to subscribe to an oath.[25] On the other hand, the Court has found a loyalty statute unconstitutional because it did not require a hearing prior to a determination to disqualify for failure to subscribe to the oath.[26]

In the instant case, the Court found that the first clause of the oath[27] could not be distinguished from oaths previously approved by the Court and simply indicated a commitment to abide by the constitutional system. The Court reasoned that the second clause[28] was merely the negative implication of the first and meant nothing more than a commitment not to engage in any illegal or unprotected means to change the government. The Court observed that a hearing is required only where the oath is unconstitutional. The Court then reasoned that since there is no constitutional right to overthrow the government by unlawful means, no rights are infringed by the oath; therefore, a hearing is not necessary. The Court, concluded that the loyalty oath statute in the instant case does not violate the first and fourteenth amendments.[29]

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[18] Connell v. Higginbotham, 403 U.S. 207, 209 (1971) (Marshall, J., concurring).

[19] Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968), *noted in* 14 WAYNE L. REV. 635 (1968); *accord*, Hosack v. Smiley, 276 F. Supp. 876 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968).

[20] Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd*, 397 U.S. 317 (1970).

[21] Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968).

[22] Ohlson v. Phillips, 304 F. Supp. 1152, 1154-55 (D. Colo. 1969), *aff'd*, 397 U.S. 317 (1970); *accord*, Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968) (government of laws and not of men).

[23] Knight v. Board of Regents, 269 F. Supp. 339, 341 (S.D.N.Y. 1967); *accord*, Hosack v. Smiley, 276 F. Supp. 876, 879 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968).

[24] Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), *aff'd*, 390 U.S. 744 (1968).

[25] *Id.* at 881.

[26] Connell v. Higginbotham, 403 U.S. 207 (1971).

[27] "I will uphold and defend . . . Massachusetts."

[28] "I will oppose . . . method."

[29] In a separate concurring opinion Justices Stewart and White reasoned that since "uphold" and "defend" are not unconstitutionally vague and overbroad, then neither is "oppose." They concluded, therefore, that the oath is not invalid under the first and fourteenth amendments.

Justices Powell and Rehnquist took no part in the consideration or decision of the case.

Justice Douglas in a dissenting opinion observed that the state's highest court had found a similar oath unconstitutional[30] and that the Supreme Court was bound by that decision to find the present oath unconstitutional. He further reasoned that since the first amendment protects the advocacy of force or illegal action to change the government except where it tends to create imminent lawless action, and since the subject oath makes protected speech a possible offense, then it infringes upon first amendment rights. He concluded that the oath was unconstitutional. In another dissenting opinion, Justice Marshall, joined by Justice Brennan disagreed with the Court's conclusion that the second clause meant essentially the same as the first. He noted that the appellants had stated in oral argument that an individual who subscribed to the second clause assumed a greater obligation than one who subscribed only to the first clause. He stated that since the last clause provided an affiant with little guidance as to the responsibilities assumed under the oath, it was impermissibly vague, and that since this vagueness tended to infringe on first amendment rights, the oath was overbroad. Justice Marshall concluded, therefore, that the oath was unconstitutional.

The approval of the "support" clause of the oath in the instant case reaffirmed an established judicial policy.[31] The validation of the "oppose" clause, however, represents an assertion of authority that is supported neither by precedent nor by pertinent surrounding facts. The Court has broadly interpreted a statute that is less clear and precise than statutes that it has previously invalidated.[32] The Court has ignored a prior state court decision invalidating an oath that is less offensive to the first amendment and due process than the present oath. In finding the second clause to be essentially the same as the first, the Court has disregarded a contrary state interpretation of the oath. In view of these factors it is surprising that the Court did not find the oath unconstitutional. This departure from precedent indicates that, in the future, the balance between first amendment and due process rights and the state's interest in insuring the loyalty of public employees will be struck more in favor of the states than it has been in the past. The instant decision did not, however, provide any guidelines as to how and where the new balance is to be struck, resulting in some uncertainty as to the future of loyalty oaths.[33] The Court's ruling regarding due process hearing requirements reconciled the inconsistency of its earlier decisions. In doing this the Court has created new guidelines applicable for determining when a hearing is required. The logic behind the guidelines, however, is not readily understood. A determination of whether a hearing is required is made only *after* the determination of an oath's constitutionality by a court. The guidelines, therefore, do not aid those responsible for drafting and administering loyalty oaths. Furthermore, if an oath is unconstitutional, the fact that a hearing was provided is neither going to alter the oath's unconstitutional character nor legitimize disqualification on its basis.[34] On the other hand, a hearing prior to disqualification based upon a constitutional oath is essential. Only through a hearing can it be guaranteed that the oath is being properly applied. In conclusion, the guidelines provided in the instant case are meaningless. Where first amendment rights are involved, due process should require a hearing in connection with any loyalty oath that is a condition for public employment.

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[30] Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967).

[31] The implicit attitude of the Court toward these "support" oaths is reminiscent of its attitude toward loyalty statutes in the early 1950's. While the oaths under consideration in these two periods are clearly distinguishable, this similarity of attitudes raises the question whether "support" oaths will in the future suffer the same fate as negative loyalty statutes. This would seem unlikely, however, since the Constitution prescribes "support" oaths for the President (U.S. CONST. art. II, § 7) and national and state legislators and all executive and judicial officers (U.S. CONST. art. VI, § 3). Indeed, it would seem that the fact the Constitution prescribes "support" oaths is a significant, if not controlling, reason for the Courts approval of such oaths required by state governments of their employees. *See* Cole v. Richardson, 92 S. Ct. 1332, 1336 (1972).

[32] *See, e.g.,* Baggett v. Bullit, 377 U.S. 360 (1964).

Robert T. Gordon, Jr.

CONSTITUTIONAL LAW—IMMUNITY STATUTES—USE AND DERIVATIVE USE IMMUNITY IS CO-EXTENSIVE WITH FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California. Prior to the scheduled appearances, the district court issued an order directing the petitioners to answer all questions before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. §§ 6002-03.[1] Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination,[2] notwithstanding the grant of immunity. They were both found in contempt by the district court. The Court of Appeals for the Ninth Circuit affirmed.[3] On writ of certiorari the United States

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[33] The uncertainty of the future of loyalty oaths is compounded by the split among the Justices on the decision — three dissenting, two not participating, two concurring, with only two actually composing the Court's opinion.

[34] *See* Connell v. Higginbotham, 403 U.S. 207, 209 (1971) (Marshall, J., concurring).

[1] Organized Crime Control Act, 18 U.S.C. §§ 6001-05 (1970). Section 6002 provides that when a witness in a governmental proceeeding refuses on the basis of his privilege against self-incrimination to testify, he may be ordered to do so despite his protests; however, none of the testimony or information derived from it may be used against the witness in a subsequent criminal proceeding. Other sections of the act are primarily concerned with procedures for implementing the act. For a detailed discussion of the legislative history of this act *see* 2 U .S. CODE CONG. & AD. NEWS 4017-91 (1970).

[2] U.S. CONST. amend. V.

[3] Stewart v. United States, 440 F.2d 954 (9th Cir. 1971).

Supreme Court, *held,* affirmed. Where an unwilling witness invokes the fifth amendment privilege against compulsory self-incrimination, he can be compelled to testify if he is granted immunity, as provided by 18 U.S.C. § 6002, from use of the testimony and evidence derived therefrom; and in subsequent criminal proceedings, the government will have the burden of proving that the evidence used is derived from a legitimate source, wholly independent of the compelled testimony. *Kastigar v. United States,* 92 S. Ct. 1653 (1972).

The power of government to secure the attendance and testimony of witnesses is an integral part of United States legal history.[4] However, there are limitations to this power,[5] the most important being the fifth amendment privilege against compulsory self-incrimination.[6] This privilege can be asserted in all types of governmental proceedings; and, it protects the witness by allowing him to refuse to give testimony which could be used against him in a subsequent criminal proceeding or could lead to the discovery of independent incriminating evidence.[7] It is applicable to state proceedings as well as federal.[8] Historically, this privilege has had a detrimental effect on the efforts of government to secure information vital to the preservation of an ordered society.[9] To counter this effect, legislatures have resorted to the passage of immunity statutes. By granting immunity to witnesses, government has sought to actually compel them to testify.[10] The first immunity statutes were enacted in response to specific current conditions and gave witnesses complete immunity from prosecution for offenses relating to the compelled testimony (transactional immunity).[11]

These statutes, however, were later found to be unworkable,[12] and in 1868, a new statute was enacted which limited the scope of the immunity, providing only that evidence obtained from the witness could not be used against him.[13] However, in *Counselman v. Hitchcock,*[14] the

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[4] *See* 8 J. Wigmore, Evidence § 2192 (McNaughton rev. ed. 1961).

[5] *See, e.g.,* Blair v. United States, 250 U.S. 273, 281 (1919).

[6] U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . . ."

[7] *See* Hoffman v. United States, 341 U.S. 479, 486 (1951) ;Blau v. United States, 340 U.S. 159 (1950); *cf.* Mason v. United States, 244 U.S. 362, 365 (1917).

[8] Malloy v. Hogan, 378 U.S. 1 (1964).

[9] Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 Yale L. J. 1568, 1569-70 (1963).

[10] *Id.* at 1570.

[11] Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156; *The Federal Witness Immunity Acts, supra* note 9, at 1571. *See also* 24 Vand. L. Rev. 815 (1971).

[12] "As a consequence of the procedural permissiveness and broad scope of the 1857 act, the committee rooms of Congress were soon converted into confessionals to which the criminals of the land rushed to wash away their sins. The large numbers of these 'immunity baths' stimulated Congress to restrict the witness's protection offered by the 1857 act." *The Federal Witness Immunity Acts, supra* note 9, at 1572.

[13] Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[14] 142 U.S. 547 (1892).

Court held that the immunity afforded under the 1868 act[15] was not coextensive with the scope of the fifth amendment privilege against compulsory self-incrimination because it did not prevent the use of incriminating evidence derived from the protesting witness's testimony.[16] In response to the Court's decision in *Counselman,* Congress passed the Compulsory Testimony Act of 1893[17] which once more granted transactional immunity. This statute became the model for federal immunity statutes until 1964 when the Court decided *Murphy v. Waterfront Commission of New York Harbor.*[18] There, the Court departed somewhat from traditional standards by sustaining a state immunity statute which provided for transactional immunity within the state, but only restricted the use of the testimony *and its fruits* in subsequent federal proceedings.[19] Much confusion and speculation followed this decision. Finally, Congress resolved the issue by passing the Organized Crime Control Act of 1970.[20] This Act completely abandoned the transactional immunity concept outlined in *Counselman v. Hitchcock*[21] and provided immunity from the use of the compelled testimony and evidence derived therefrom (use and derivative use immunity).[22]

The instant Court first considered the petitioners' contention that no immunity statute, however drawn, could afford a lawful basis for compelling incriminating testimony. The Court rejected this contention, upholding *Brown v. Walker*[23] and *Ullman v. United States,*[24] decisions which upheld the constitutionality of immunity statutes.[25] The Court then considered the question whether the protection of immunity granted under 18 U.S.C. §§ 6001-05 was coextensive with the scope of the fifth amendment privilege against compulsory self-incrimination. The Court held that use and derivative use immunity *was* coextensive with the scope of the fifth amendment privilege, and therefore, was sufficient to compel testimony over a claim of the privilege. The Court further held that although a grant of immunity must give protection commensurate with that afforded by the fifth amendment, it need not be broader. Furthermore, the Court stated that transactional immunity afforded the witness broader protection than did the fifth amendment and was, therefore, not required. The petitioners contended that use and derivative use immunity would not adequately protect a witness from various incriminating uses of the compelled testimony because it would be almost impossible to identify the subtle ways in which the testimony might disadvantage the witness. The Court, citing *Murphy v. Waterfront Commission of New York Harbor,*[26] rejected this argument, holding that a witness raising a claim under the statute need only show that he testified under a grant of immunity in order to shift to the government the burden of proving that all the evidence it uses is derived from legitimate independent sources.[27] Mr. Justice Douglas, in his dissenting opinion, concluded that use and derivative use immunity could not be effectively enforced merely by placing the burden of proof on the government. Furthermore, he maintained that only full transactional immunity standards outlined in *Counselman v. Hitchcock*[28] could be coextensive with the fifth amendment privilege. Mr. Justice Marshall, dissenting, concluded that the majority's decision left the witness dependent upon the integrity and good faith of the prosecuting authorities for the preservation of his rights. He argued, moreover, that placing the burden of proof on the government was no real safeguard because the government could merely assert that the evidence was independent and the witness would not be in a position to obtain contrary evidence.

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[15] Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[16] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892); *accord,* Ullman v. United States, 350 U.S. 422 (1956).

[17] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

[18] 378 U.S. 52 (1964).

[19] "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79.

[20] Organized Crime Control Act, 18 U.S.C. §§ 6001-05 (1970).

[21] 142 U.S. 547 (1892).

[22] Organized Crime Control Act, 18 U.S.C. §§ 6002-03 (1970).

[23] 161 U.S. 591 (1896).

[24] 350 U.S. 422 (1956).

[25] *See, e.g.,* Gardner v. Broderick, 392 U.S. 273, (1968); Ullman v. United States, 350 U.S. 422 (1956); McCarty v. Arndstein, 266 U.S. 34 (1924); Brown v. Walker, 161 U.S. 591 (1896).

The original purpose for passing immunity statutes was to allow government to circumvent the fifth amendment privilege against self-incrimination and obtain valuable testimony from witnesses who were themselves criminally involved in the activities under investigation.[29] However, a grant of immunity can not actually *force* a witness to testify. He may choose to accept a citation for contempt rather than testify if he believes the risks are too great. Although the instant Court has found that use and derivative use immunity is coexistensive with the fifth amendment privilege, and that transactional immunity is *not* constitutionally required, it seems clear that the new standard offers a prospective witness less protection than did the former; therefore, witnesses may be less likely to *actually testify* in future governmental proceedings. As Mr. Justice Marshall pointed out in his dissent, to positively guarantee that absolutely no use will be made of the testimony or its fruits would be all but impossible. Certainly, future witnesses will weigh the hazards involved, and might well choose to accept a contempt citation rather than testify and risk even the possibility of subsequent criminal prosecution. The practical result may be that while the witness will not be denied his constitutionally protected rights, the government *will* be denied access to valuable testimony. An individual witness may often be only one member of a large criminal organization or may play only a small part in a complicated criminal conspiracy. For this reason, the government's ability to obtain testimony from witnesses involved in criminal activities should be preserved so that the testimony obtained can be used to attack crime on a broader scale, stopping it before it occurs. It is submitted that this decision, by upholding the validity of use and derivative use immunity, thereby raising fears of possible prosecution in the minds of potential witnesses, will seriously hamper the government's ability to secure this useful testimony in the future.

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[26] 378 U.S. 52 (1964).

[27] "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79 n.18.

[28] 142 U.S. 547 (1892).

[29] *See* Heike v. United States, 227 U.S. 131 (1913).

Jon A. Jennings

CONSTITUTIONAL LAW—SCHOOL REGULATIONS—HAIR LENGTH REGULATIONS ARE CONSTITUTIONAL IN PUBLIC SCHOOLS

Appellee, a sixteen year old student, was denied admission to high school for his junior year because he was in violation of a school board regulation concerning length of male students' hair.[1] After conferring with school officials, appellee filed suit in the U.S. District Court for the Western District of Texas seeking injunctive and declaratory relief. Plaintiff asserted that his long hair was not a disruptive influence which should properly be controlled and that the regulation violated his first and fourteenth amendment rights. The defendant contended that students' long hair caused disciplinary, health and safety problems and that such a regulation was necessary. The district court found that the reasons proposed by the school board were not valid, that there was no reasonable relation between the regulation and legitimate school board objectives, and that as a matter of law the regulation violated the due process and equal protection clauses of the fourteenth amendment. On appeal to the Fifth Circuit en banc, *held,* reversed. Students do not have the right to wear their hair in any desired length and style while attending a public school. *Karr v. Schmidt,* No. 31045 (5th Cir., April 28, 1972).

While students theoretically do not give up any of their constitutional rights when entering the academic environment,[2] litigation concerning the validity of school hair regulations has burgeoned in the last decade.[3] In considering the validity of such rules the court must ask two questions: (1) Is the student's interest in wearing long hair constitutionally protected; and (2) if it is protected what showing must a school board make to override that interest.[4] The origin of constitutional protection for long hair has been the source of a great deal of conjecture in the courts. The allegation that long hair is a form of symbolic expression protected by the first amendment has been largely rejected.[5] Regulation of hair length is not cruel and unusual punishment under the eighth amendment.[6] One of the most discussed attacks on hair rules concerns the unconstitutional invasion of privacy protected by the ninth amendment.[7] This approach has been favorably received by the First,[8] Seventh[9] and Eighth[10] Circuits, while it was disapproved by the Fifth,[11] Sixth,[12] Ninth[13] and Tenth[14] Circuits. The Seventh Cir-

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[1] This regulation stated:

> Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; i.e. ponytails, buns, wigs, combs, or straps.

[2] *See* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970).

[3] The first of the hair cases was Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). In this case the court sustained a hair regulation because of what it considered a potential for disruption caused by long hair.

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[4] 84 HARV. L. REV. 1702, 1704 (1971).

[5] Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), held that although long hair may sometimes be a form of expression, it was not in the particular fact situation presented. Davis v. Firment, 269 F. Supp. 524, (E. D. La. 1967), *aff'd mem.*, 408 F.2d 1085 (5th Cir. 1969), held that the wearing of long hair does not symbolize anything. The first amendment argument was rejected by the Sixth Circuit in Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970). Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), stated that long hair constituted a form of conduct not intended to express an idea and thus could not be afforded protection as speech. The Ninth Circuit refused the first amendment argument in King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972). The Tenth Circuit dismissed this attack in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

[6] Davis v. Firment, 269 F. Supp. 524 (E. D. La. 1967), *aff'd mem.,* 408 F.2d 1085 (5th Cir. 1969).

[7] The theoretical source of this argument is the discussion of privacy used by the Court to invalidate a Connecticutt statute forbidding use of contraceptives in Griswold v. Connecticutt, 381 U.S. 479 (1965).

[8] In Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), the court stated that "within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." *Id.* at 1285.

[9] *See* Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[10] Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), held:

> We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of societal values, it commands the protection of the Fourteenth Amendment Due Process Clause. *Id.* at 1075.

[11] In Davis v. Firment, 269 F. Supp. 524 (E. D. La. 1967) *aff'd mem.,* 408 F.2d 1085 (5th Cir. 1969), the court proposed that "while the right of privacy may be so sacred as to be 'fundamental', the same certainly cannot be said of the free choice of grooming." 269 F. Supp. at 529.

[12] *See* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[13] In King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972), the court countered the privacy argument with this rationale:

> The conduct to be regulated here is not conduct found in the privacy of the

cuit is the only one to rule that the regulation of a male student's hair length is a violation of the equal protection clause of the fourteenth amendment.[15] The circuits are divided on the question of whether such regulations violate the due process clause of the fourteenth amendment.[16] Fifth Circuit rulings prior to the instant case have intimated that the right to wear long hair was protected, even though refusing to specify the specific channel of protection.[17] In order to determine the validity of the regulation the state interest necessitating it must be balanced against the student's rights.[18] The burden of proof in such situations is

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> home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others. 445 F.2d at 938.

[14] *See* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

[15] *See* Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (rule not made equally applicable to females). *Contra,* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[16] Those circuits approving this concept include the First, Fourth, Seventh and Eighth Circuits. *See, e.g.,* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

The due process argument has been rejected in particular fact situations by the Fifth, Sixth, Ninth and Tenth Circuits. *See, e.g.,* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Gfell v. Richardson, 441 F.2d 444 (6th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

[17] In Whitsell v. Pampa Ind. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970), *aff'd per curiam,* 439 F.2d 1198 (5th Cir. 1971), the court stated that "the wearing of long hair . . . is a right protected . . . by the Constitution." 316 F. Supp. at 854. In Dawson v. Hillsborough County, Fla. School Bd., 322 F. Supp. 286 (M.D. Fla. 1971), *aff'd per curiam,* 445 F.2d 308 (5th Cir. 1971), the court concluded that:

> [T]he right to wear one's hair at any desired length or manner is a federally protected right. If this conclusion were incorrect, then the Fifth Circuit would not have required a showing of interference with the educational process for a hair regulation to be sustained. 322 F. Supp. at 304.

[18] Until recently the Fifth Circuit was the leader in applying this sort of situational approach. In Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968), the court stated that the reasonableness of such regulations must be decided in its particular setting and factual background. Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970), held that "[t]he touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process." *Id.* at 303.

This approach has been applied by several other circuits. *See, e.g.,* Massey v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* sometimes on the student[19] and sometimes on the school board.[20] Justifications offered for hair regulations include disruption of classroom atmosphere and decorum, fights and disturbances, decreased classroom performance, and health and safety hazards.[21] Some schools offer student participation in the rule making process as a justification.[22] The Tenth Circuit views hair cases as a state problem not appropriate for federal court adjudication and dismisses such cases for failure to state a claim on which relief can be granted.[23]

In the instant case the court held that the right to style one's hair as he pleases in the public schools is not protected by the first amendment. The court rejected the ninth amendment right of privacy argument based on *Griswold* and held that a regulation limiting permissible hair length does not unconstitutionally restrict privacy. The court found that the right to wear long hair does not rise to the level of a fundamental right protected by substantive due process provisions of the fourteenth amendment. Finding that this regulation was founded on a rational basis, the court held that there was no violation of the equal protection clause. The court decided that the proper standard of review is "whether

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92 S. Ct. 703 (1972); Eisner v. Stamford Bd. of Ed., 440 F.2d 803 (2d Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

[19] King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972).

[20] Massey v. Henry, 455 F.2d 779 (4th Cir. 1972); Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Whitsell v. Pampa Ind. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970), *aff'd per curiam,* 439 F.2d 1198 (5th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Ferrell v. Dallas Ind., School Dist. 392 F.2d 697 (5th Cir. 1968), *cert. denied* 393 U.S. 856 (1968). *See also* Eisner v. Stamford Bd. of Ed., 440 F.2d 803 (2d Cir. 1971).

[21] In Ferrell v. Dallas Ind., School Dist., 392 F.2d 697 (5th Cir. 1968), the regulation was upheld when the school board proved distraction and disturbances including fights, obscene language, and harassment of long hairs. In Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), a regulation was upheld on proof of threats by students against long hairs, safety hazards, and other distractions from the educational process including combing hair in class. A hair rule was struck down in Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970), despite allegations of distraction and that conforming students perform better in school. This question of countervailing interests involves the degree of substantial disruption which the school board can actually prove.

[22] In Wood v. Alamo Heights Ind. School Dist., 308 F. Supp. 551 (W.D. Tex. 1970), *aff'd mem.,* 443 F.2d 355 (5th Cir. 1970), the court viewed such student participation favorably. But in Dawson v. Hillsborough County, Fla. School Bd., 322 F. Supp. 286 (M.D. Fla. 1971), *aff'd per curiam,* 445 F.2d 308 (5th Cir. 1971), the court held that "a regulation impinging upon constitutional rights cannot be justified on the basis of the procedural machinery which led to the regulation's adoption." 322 F. Supp. at 300.

[23] Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

the regulation is reasonably intended to accomplish a constitutionally permissible state objective" and placed the burden of proof upon the one challenging the regulation. The court established a per se rule that school hair regulations are constitutionally valid. Moreover, the court directed the district courts to dismiss all future long hair suits because of failure to state a claim for which relief can be granted.[24]

In dissent Judge Wisdom stated his belief that the right for one to wear his hair as he pleases is a fundamental right embraced within the concept of "liberty." He criticized the apparent disregard of the majority of the court for the findings of fact of the lower court. In his opinion long hair is protected by the first amendment and the due process and equal protection clauses of the fourteenth amendment.[25]

By establishing a per se rule validating public school hair length regulations and a summary procedure for dismissing such actions, the Fifth Circuit has departed from its own precedents[26] and has adopted an extreme position accepted by only one other circuit.[27] The question of regulation of hair length in the public schools has risen to the level of a major dispute among the circuits,[28] but time and again the United States Supreme Court has refused to settle this conflict.[29] The only two Supreme Court Justices to speak out on the question hold differing views.[30] The solution of this question relies directly on the adjudication of major constitutional rights under the first, ninth and fourteenth amendments. In order to abridge the rights of students by regulating the length at which they can wear their hair, school boards should be required to demonstrate an important state interest which jusifies such regulations. The Fifth and Tenth Circuits have now adopted procedures in such cases which deprive the litigants of an evidentiary hearing. Our courts should not condone the usurpation of the rights of a minority by simply labelling these rights as unimportant. As the Fourth Circuit stated in a recent opinion:

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[24] In a concurring opinion Judge Bell agreed with the result reached by the court and with the rational basis standard applied by the court. He expressed a belief that the element of arbitrariness had not been made clear in previous cases and perhaps caused the district court to err.

[25] In a dissenting opinion Judge Godbold favored the standards formerly established by the court in such cases as *Ferrell.* He proposed a return to the case by case approach.

In dissent Judge Roney stated that hair length regulations violated the ninth amendment because they were a substantial intrusion into personal privacy.

[26] *See, e.g.,* Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

[27] The Tenth Circuit announced such a holding in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972).

[28] At the present time four circuits — the Fifth, Sixth, Ninth and Tenth — have held hair length restrictions constitutional; and four circuits — the First, Fourth, Seventh and Eighth — have held the right to wear long hair constitutionally protected. As Justice Douglas stated in his dissent to the denial of certiorari in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972) (dissenting opinion): "I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights." 92 S. Ct. at 1292.

[29] Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied,* 92 S. Ct. 1292 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972); Stevenson v. Wheeler County Bd. of Ed., 426 F.2d 1154 (5th Cir. 1970), *cert. denied,* 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Ferrell v. Dallas Ind. School Dist., 932 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

> Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty.[31]

John P. Price

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[30] In Karr v. Schmidt, 401 U.S. 1201 (Black, Circuit Justice, 1970), the late Justice Black had the following comments:

> Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. *Id.* at 1202.

In a dissent to the denial of certiorari in King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 92 S. Ct. 703 (1972) (dissenting opinion), Justice Douglas considered freedom to wear long hair as fundamental in our constitutional scheme which was "designed to keep government off the backs of people." *Id.* at 705. In a dissent to denial of certiorari in Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968) (dissenting opinion), Justice Douglas stated:

> It comes as a surprise that in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. 393 U.S. at 856.

[31] Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

CONSTITUTIONAL LAW—DUE PROCESS—A NON-UNANIMOUS JURY DOES NOT VIOLATE THE REASONABLE DOUBT STANDARD OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

Appellant was convicted of robbery by a jury verdict of nine to three and sentenced to serve thirty-five years imprisonment under Louisiana law, which permits convictions by a less than unanimous verdict in cases where the punishment is necessarily at hard labor.[1] The Louisiana Supreme Court affirmed the conviction and rejected appellant's argument that the statute violated the due process and equal protection clauses of the fourteenth amendment.[2] On appeal to the United States Supreme Court, *held,* affirmed. A jury verdict of nine to three as provided for by Louisiana law did not deprive the appellant of due process for failure to satisfy the reasonable doubt standard. *Johnson v. Louisiana,* 92 S. Ct. 1620 (1972).[3]

Unanimous jury verdicts became a part of the common law criminal trial in the fourteenth century.[4] Jury unanimity in criminal trials[5] is provided for in all but six states in this country.[6] The Supreme Court

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[1] LA. CRIM. PRO. CODE ANN. art. 782, § 41 (1967) provides:

> Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived.

[2] State v. Johnson, 225 La. 314, 230 So.2d 825 (1970).

[3] Appellant conceded that Duncan v. Louisiana, 391 U.S. 145 (1968), which made the sixth amendment trial by jury in criminal cases applicable to the states through the fourteenth amendment, did not apply since it was decided after his trial had begun. In Apodaca v. Oregon, 92 S. Ct. 1628 (1972), which was decided with the instant case, the Court held that the sixth amendment, as made applicable to the states by the fourteenth amendment, did not require jury unanimity.

[4] 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 318 (7th ed. 1956). *See also* Grooms, *The Origin and Development of Trial by Jury,* 26 ALA. LAW. 162 (1965) (for discussions on the historical development of jury trials); Haralson, *Unanimous Jury Verdicts in Criminal Cases,* 21 MISS. L.J. 185 (1950).

[5] Approximately one-half of all the states require only a majority verdict in civil cases where the proof must only be by a preponderance of the evidence. Comment, *Should Jury Verdicts be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417 (1968). *See, e.g.,* MISS. CODE ANN. § 1801 (1956).

[6] Louisiana and Oregon are the only two states which permit convictions by less than unanimous verdicts in felony cases. *See* ORE. CONST. art. 1, § 11 (1970).

Four other states permit convictions by less than unanimous verdicts in misdemeanor cases. IDAHO CODE ANN. § 19-1902 (1948), permits misdemeanor convictions by a five-sixths majority vote. OKLA. CONST. art. II, § 19, provides that three-fourths of the jury may render a verdict in less than felony cases. TEX. CONST. art. 5, § 13, has held that jury unanimity is a requirement of jury trials in federal courts,[7] but the Court has also stated in dicta more than once that the due process clause of the fourteenth amendment might not be violated by a state law that would dispense with unanimous juries.[8] These decisions have even suggested that a state could dispense with criminal juries entirely without violating due process.[9] Another case has suggested that the due process clause of the fourteenth amendment requires only that criminal trials be fundamentally fair.[10] The standard that the state has the burden of proving every necessary element of the crime beyond a reasonable doubt in order to obtain a conviction became, along with jury unanimity, a part of the criminal jury trial towards the latter part of the eighteenth century.[11] The Supreme Court has often upheld the view that guilt must be proved beyond a reasonable doubt in criminal cases.[12] The Court expressly held in *In Re Winship*[13] that the due process clause of the fourteenth amendment required that the accused must be protected against conviction unless the reasonable doubt standard was met. Whether or not proof beyond a reasonable doubt required that the jury be unanimous was a question presented in two circuits with opposite results. In *Hibdon v. United States,*[14] the Court held that unanimity was inseparable from reasonable doubt and was required by due process. The Court held in *Fournier v. Gonzalez*[15] that due process did not require a unanimous jury verdict and that the state met its burden of proof with a ten to two jury verdict.

In the instant case, the Court held that the mere lack of jury unanimity alone does not mean that the reasonable doubt standard, which is required by the due process clause of the fourteenth amendment, has been violated.[16] The Court felt that merely because three

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provides that nine out of twelve jurors may render a verdict in civil cases and crimes below the grade of felony. MONT. CONST. art. III, § 23, provides that two-thirds of the jury may render a verdict in misdemeanor cases.

[7] Andres v. United States, 333 U.S. 740 (1948); Patton v. United States, 281 U.S. 276 (1930). *See* FED. R. CRIM. P. 31(a) (requires unanimous jury verdicts). With reference to seventh amendment civil jury trials, *cf.* American Publishing Co. v. Fisher, 166 U.S. 464 (1897) (which require these jury verdicts to be unanimous).

[8] Jordan v. Massachusetts, 225 U.S. 167 (1912) (dictum); Maxwell v. Dow, 176 U.S. 581 (1900) (dictum).

[9] *Id.*

[10] Palko v. Connecticut, 302 U.S. 319 (1937).

[11] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321 (1954). *See also* Morano, *Retreat from Unanimity and Reasonable Doubt in Criminal Cases,* 1 U. TOL. L. REV. 337 (1969), for a discussion on the origin of the reasonable doubt standard in relation to jury unanimity.

[12] *See, e.g.,* Brinegar v. United States, 338 U.S. 160 (1949); Coffin v. United States, 156 U.S. 432 (1895); Davis v. United States, 160 U.S. 469 (1895).

[13] 397 U.S. 358, 364 (1970).

[14] 204 F.2d 834 (6th Cir. 1953).

[15] 269 F.2d 26 (1st Cir. 1959), *cert. denied,* 359 U.S. 931 (1959).

[16] The Court also found that the statute did not violate equal protection. It stated that the state had a rational basis (facilitating, expediting, and reducing

jurors voted to acquit, it did not follow that the majority failed to honestly find that the proof reflected guilt beyond a reasonable doubt. The Court stated that there was no reason to believe that a reasoned discussion among the jurors did not occur prior to the attainment of a majority verdict for conviction. The Court considered it far more likely that the minority of the jurors would have swayed more jurors to their side if the argument in favor of acquittal was persuasive. The Court concluded that the state had satisfied its burden of proof when nine jurors voted to convict. It also rejected the contention that the vote of the three jurors for acquittal impeached the verdict of the other nine, so that it could be said that guilt was not in fact proved beyond a reasonable doubt. The Court concluded that disagreement alone did not establish reasonable doubt, in view of the fact that a heavy majority was convinced of guilt. The Court pointed out that the fact that rational men may disagree does not indicate a failure of proof beyond a reasonable doubt. It was further stated by the Court that jury verdicts have been regularly sustained even though there was evidence that the jury could have entertained a reasonable doubt,[17] the judge might have disagreed with the jury,[18] or the appellate judges could not agree among themselves on the issue of whether or not there was sufficient evidence to support a verdict.[19] The Court concluded therefore that the appellant was not deprived of due process where a heavy majority of the jurors voted to convict.[20]

The decision of the Court is another step in a trend to de-emphasize the value of the twelve man jury. In *Williams v. Florida*,[21] the Court held that the right to trial did not include the right to a twelve man jury. The states are, therefore, free to provide for criminal juries of less than twelve men. The instant decision not only reduces the size of the jury; it goes one step further. It allows the viewpoints of the majority dissenters to be entirely disregarded. With a unanimity requirement, the voice of even a lone dissenter must necessarily be heard.[22] A further

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expense in the administration of justice) for the classification provided for in the statute (unanimous juries for capital cases, verdicts of 9-3 for felonies, and juries of 5 for misdemeanors). The Court found this method of classification not to be invidious.

[17] United States v. Quarles, 387 F.2d 551, 554 (4th Cir. 1967).

[18] Takahashi v. United States, 143 F.2d 118, 122 (9th Cir. 1944).

[19] United States v. Johnson, 433 F.2d 1160, 1166 (D.C. Cir. 1970).

[20] In a concurring opinion, Justice Blackmun indicated he would have difficulty upholding a 7-5 standard.

In dissent, Justice Stewart, joined by Justice Brennan and Justice Marshall, determined that the fourteenth amendment required jury unanimity to guarantee against systematic discrimination in the selection of criminal juries.

Justice Douglas, in a dissenting opinion joined by Justice Brennan and Justice Marshall, asserted that even though the Constitution did not mention unanimous juries, neither did it mention the presumption of innocence, nor did it say that guilt must be proved beyond a reasonable doubt in criminal cases.

[21] 399 U.S. 78 (1970).

[22] *See* Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 369 (1972).

effect of the decision will be to strengthen the hand of the prosecution, which will reduce the number of hung juries.[23] In view of this, the presumption of innocence has been undercut, and the burden of proof has been shifted towards the defendant. The defendant is faced with a greater burden to prove his innocence when more than three jurors must be convinced that there is a reasonable doubt in order for him to gain an acquittal. In view of the recent decision of *In Re Winship*,[24] which held the reasonable doubt standard to be a requisite of fourteenth amendment due process, the Court was forced to define the reasonable doubt standard in relation to the jury in the instant case. In doing so, the Court could have reached a different but entirely logical and reasonable conclusion. Instead of defining reasonable doubt in terms of individual jurors as it did, it could have defined it in relation to the jury as an entity.[25] In this light, the reasonable doubt of any one part of that entity becomes a reasonable doubt of the entity as a whole. Thus, jury unanimity would have been preserved. The Court did not choose to consider this line of reasoning and chose to say instead that the reasonable doubt of an individual juror did not mean other jurors entertained a reasonable doubt. Even in adopting the line of reasoning that it has, the Court failed to establish definitive guidelines for state legislatures to follow. The Court stated that a heavy majority of nine to three was permissible, but failed to indicate whether lesser majority verdicts would be adequate. Future decisions engendered by foreseeable state legislative reactions to the instant case will undoubtedly specify in more precise terms what is meant by a "heavy majority".

George Lyles

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[23] For a thorough discussion on the effect of hung juries by non-unanimous verdicts, *see* Kalvin and Zeisel, *The American Jury, Notes for an English Controversy,* 48 CHI. B. REC. 195 (1967).

[24] 397 U.S. 358 (1970).

[25] *See* Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials,* 58 J. CRIM. L. 211 (1967).

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—WARRANTLESS INSPECTION IN ENFORCEMENT OF FEDERAL GUN CONTROL ACT IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT

Respondent was convicted in federal district court[1] of dealing in firearms without having paid a special occupational tax.[2] The evidence which convicted respondent was obtained during an inspection authorized by the Gun Control Act of 1968.[3] A United States Treasury Agent, who presented identification, inspected respondent's records and requested permission to inspect a locked gun storeroom. When respondent asked if the agent had a search warrant, he was shown a copy of the statute authorizing inspection.[4] After reading the statute, respondent unlocked the room and the agent discovered the violation.[5] Respondent maintained that the Gun Control Act was unconstitutional under the fourth amendment in permitting inspection of non-public business areas without a search warrant.[6] In addition, he contended that his consent to the search was not voluntary. The trial court refused to accept respondent's allegations. The 10th Circuit Court of Appeals reversed, holding that under recent precedent the act was unconstitutional and that the evidence seized had to be suppressed.[7] On writ of certiorari the United States Supreme Court, *held,* reversed and remanded. Warrantless inspection of gun storeroom, authorized under federal gun control act which results in seizure of evidence is not prohibited by the fourth amendment. *United States v. Biswell,* 92 S. Ct. 1593 (1972).

The right to be free from unreasonable search and seizure was an element productive of the Revolutionary War.[8] Its origins in our Constitution were a result of the notorious writs of assistance used as general search warrants by the English in the American colonies.[9] However, after the fourth amendment's advent, no further cases of importance were reported until 1886, in *Boyd v. United States*.[10] This case, which has been repeatedly cited by the Court on subsequent occasions, sets forth a debatable connection between the fourth amendment and the self-incrimination clause of the fifth amendment. Thereafter, it was reasoned that the fourth amendment applied only to criminal activities.[11] This principle remained virtually unchallenged throughout the first half of the twentieth century[12] with the result that civil and administrative inspections proceeded unchecked.[13] During this period, dicta in criminal cases concerning search and seizure doctrine indicated greater emphasis on the intrusion of the search than the purpose involved.[14] This shift was brought to the surface in 1949 by the Court of Appeals for the District of Columbia. In a case concerning a conviction for refusal to allow a warrantless search by a health department inspector, the court held that civil and criminal proceedings were to be subjected to the same standards under the fourth amendment.[15] The decision was not to remain viable, because in 1959, an opposite result was reached by the Supreme Court in *Frank v. Maryland*.[16] In a 5-4 decision, the Court approved the lower court's conviction. The opinion noted that inspections of this type, i.e., municipal or administrative, are only on the periphery of the important rights safeguarded by the fourth amendment.[17] The following year, a case with similar facts once again faced the Court.[18] The appeal was affirmed per curiam by an equally divided Court.[19] Nonetheless, the dissenting opinion by Justice Brennan demonstrated that the Court was far from having a stable doctrine in *Frank v. Maryland.*[20]

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[1] United States District Court for the District of New Mexico; Case unreported.

[2] Respondent was licensed to sell certain sporting weapons under 18 U.S.C. § 923 (1968). The weapons found in his possession were "firearms" under 26 U.S.C. § 5845 (a) (1968), therefore he was required to pay a special occupational tax of $200.00 a year under 26 U.S.C. § 5801 (1968).

[3] 18 U.S.C. § 921 *et seq.* (1968).

[4] The pertinent section states:

> The Secretary may enter during business hours the premises (including places of storage) of any . . . dealer . . . for the purpose of inspecting or examining (1) any record or documents required to be kept . . . , and (2) any firearms or ammuntion kept or stored . . . at such premises. 18 U.S.C. § 923 (g) (1968).

[5] The violation was possession of two sawed off rifles under 26 U.S.C. § 5845 (a) (1968).

[6] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

[7] United States v. Biswell, 442 F.2d 1189 (10th Cir. 1971).

[8] J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20 (1966).

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[9] N. Lasson, The History And Development Of The Fourth Amendment To The U.S. Constitution 55 (1937).

[10] 116 U.S. 616 (1886) (Boyd involved a statute which required businessmen to produce any records which would tend to prove any allegation made by the United States that the defendant had violated revenue laws).

[11] *See* Comment, *Administrative Inspection Procedures Under The Fourth Amendment-Administrative Probable Cause,* 32 Albany L. Rev. 155, 157 (1967).

[12] During this period a steady stream of criminal cases concerning search and seizure were reviewed by the Court with the resulting development of the federal exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). The rule was subsequently extended to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The rule protected against the use of evidence obtained through illegal search and seizure.

[13] Numerous challenges during this period to the administrative inspection of commercial premises were without success. *See, e.g.,* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (inspection of records under the Fair Labor Standards Act); Currin v. Wallace, 306 U.S. 1 (1939) (challenge to constitutionality of inspection powers under Tobacco Inspection Act of 1935); Wilson v. United States, 221 U.S. 361 (1911) (inspection of offending matter in regard to mail fraud).

[14] *See* 48 Denver L. J. 87, 90 (1971).

[15] *See* District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950); Judge Prettyman stated for the majority:

> To say that a man suspected of crime has a right to protection against search of his home without a warrant but that a man not suspected of crime has no such protection is a fantastic absurdity. 178 F.2d 13.

Judge Holtzoff argued vigorously for the dissent that the fourth amendment had no applicability to administrative inspections.

[16] 359 U.S. 360 (1959). A factual situation similar to District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950), existed here i.e., conviction for refusal to submit to a warrantless inspection by municipal authorities. Although the cases on municipal inspections are not directly in point

The constitutionality of administrative inspections lay dormant until the twin decisions in *Camara v. Municipal Court*[21] and *See v. City of Seattle*[22] were handed down by the Court in 1967. The change in personnel was evident as *Frank* was expressly overruled.[23] The importance of these decisions to the instant case was the holding in *See,* which specifically extended fourth amendment protection to administrative inspection of commercial premises. The gravity of *See* was undercut by a reservation interposed by Justice White. He expressly limited *See* to its facts and stated that there was no implication that the Court was questioning regulatory programs, e.g., licensing certain businesses.[24] Although many legal writers were lauding the result of *Camara* and *See* as a clarification of the confusing doctrine surrounding the field of administrative searches,[25] most were ignoring Justice White's admonition

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with the instant decision, their mention is essential to demonstrate the development of the law.

[17] Frank v. Maryland, 359 U.S. 360, 367 (1959). *See also* Sonnenreich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under An Expanded Fourth Amendment,* 24 S.W. L.J. 418, 425 (1970) (an extended discussion of Frank and its reasoning).

[18] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960).

[19] Justice Stewart took no part in this decision because his father was sitting on the Ohio Supreme Court when it decided the case. Ohio *ex rel.* Eaton v. Price, 168 Ohio St. 123, 151 N.E.2d 523 (1958).

[20] 359 U.S. 360 (1959) (dissent maintained that the warrant framework should be used in administrative inspections with a relaxed doctrine of probable cause).

[21] 387 U.S. 523 (1967) (reversal of a conviction for refusal to allow an inspection by the city housing authorities).

[22] 387 U.S. 541 (1967) (extended Camara's fourth amendment protection to inspection of non-public business premises).

[23] Justice White replaced Justice Frankfurter in 1962. The same year Justice Goldberg replaced Justice Whittaker. Justice Goldberg resigned in 1965 and Justice Fortas took his place.

[24] In his opinion Justice White stated:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. 387 U.S. at 546.

[25] *See* Comment, *Administrative Inspection Procedures Under The Fourth Amendment—Administrative Probable Cause, supra* note 11, at 181; 42 CONN. B.J. 255, 264-65 (1968). *ut cf.* Sonnenreich & Pinco, *supra* note 17, at 431 n.101.

regarding the Court's attitude on regulatory inspections.[26] Therefore, it was not suprising when several federal courts declared *Camara* and *See* inapplicable to administrative inspections authorized by Congress as part of a regulatory licensing program.[27] These decisions cited *See* as exempting such searches from the warrant requirements of the fourth amendment.[28] In *Colonade Catering Corp. v. United States* another circuit court ruling followed this line of decisions[29] and was reversed by the Supreme Court.[30] The Court recognized the long history of governmental control on the liquor industry and did not question the authority of Congress to implement such law. However, several qualifications were made which would lead to the instant decision. The Court first set forth that in the absence of explicit legislative regulation of the mode of inspection, the guidelines of the fourth amendment must be followed.[31] More important, the Court stated that the Congressional mandate had not authorized *forcible* entry without a search warrant. The Court concluded that the express provisions for penalties when entry was refused demonstrated the legislative choice of a standard precluding the use of force without a warrant.[32] *Colonade* indicated that the Court felt Congress could legislate narrowly defined statutes authorizing warrantless regulatory inspections. The only stumbling block to practically unlimited searches was that there be an informed voluntary consent.[33] Although the stage seemed to be set for the instant case, a decision in 1971 allowing welfare worker's "visitation" as a condition to receive Aid For Dependent Children payments clouded the question of administrative inspections.[34] The problem introduced was the Court's examination of *Camara* and *See*. In distinguishing them, it was surmised that they concerned criminal prosecutions for refusal to permit searches, whereas only a civil sanction attached to a refusal to submit to a welfare worker's visit.[35] The Court stated that had there been some criminal prosecution involved in a refusal, *Camara* and *See* would apply and a search warrant would be necessary to conduct an inspection.[36]

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[26] *See* note 24 *supra*.

[27] United States v. Sessions, 283 F. Supp. 746 (N.D. Ga. 1968); United States v. Duffy, 282 F. Supp. 777 (S.D.N.Y. 1968) (Internal Revenue Service inspections under 26 U.S.C. § 5146(b) (1958). *Contra*, United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968).

[28] An important collateral issue was raised which is beyond the scope of full discussion in this note; the voluntariness of consent given in submission to an official's claim of authority. This question has been extensively discussed in criminal cases. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968).

[29] 410 F.2d 197 (2d Cir. 1969).

[30] 397 U.S. 72 (1970).

[31] *Id.* at 77.

[32] *Id.* at 77. The dissent felt that the Congressional mandate had included the right to make forcible warrantless searches. *Id.* at 78-81.

[33] A federal court subsequently examined this problem in United States v. Alfred M. Lewis, Inc., 431 F.2d 303 (9th Cir. 1970) (inspection under Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 374(a) (1962)).

[34] Wyman v. James, 400 U.S. 309 (1971).

[35] *Id.* at 325.

In the instant case, the Court held that *See* reserved the question of fourth amendment applicability to federal regulatory statutes authorizing warrantless inspections.[37] The Court also stated that an analogy could be drawn between one who voluntarily submits to a lawfully authorized regulatory inspection and a person who acquiesces to a search of a dwelling authorized by a warrant. In both situations, the person is accepting the mandate of legal process rather than face criminal sanctions. Furthermore, the Court rejected as inapposite a challenge based on submission by involuntary consent, coerced under color of law. The Court held that the legality of a search which is carefully regulated by statute is structured on the authority of valid legislation and not on consent. The Court noted that although gun control is not as deeply rooted as regulation of the liquor industry, there is an inherent public interest in effective control of firearms traffic and warrantless, unannounced inspections are necessary to achieve the goals of the statute. The Court also said that where a businessman chooses to deal in a heavily regulated industry, he is held to be informed as to the necessity, expectability, and limits of governmental inspections. Under such regulatory statutes, the dealer's right of privacy is not unjustifiably interfered with by inspections performed without a warrant. Therefore, the Court concluded that where an urgent federal interest is involved and the interference with privacy is not unreasonable, a warrantless inspection may be authorized by a statute narrowly limited in time, place, and scope without offending the protection afforded by the fourth amendment.[38]

Justice Douglas, in dissent, stressed that the decision in *Colonade* involved a statute very similar to the one in the instant case. He rejected the majority's reasoning that had the search in *Colonade* been without forcible entry, it would not have been reversed. Justice Douglas also maintained that consent in *Biswell* was not freely given.[39]

The decision in *Biswell* was not totally unexpected. The previous opinions concerning warrantless inspections dealt primarily with administrative searches of dwellings. Until the decision in *See,* the Court had traditionally shown more respect for the protection of individuals from governmental control than businesses.[40] One indicator of the Court's reluctance to burden regulatory programs with the warrant procedure was Justice White's express reservation in *See* regarding licensing controls.[41] Furthermore, Justice Douglas gave a preview of his attitude on the matter in his dissent to *Wyman v. James.*[42] Although *Colonade* overturned a warrantless inspection, the Court's basic posture did not change. It simply added a caveat to the existing doctrine: the statutorily authorized inspection was valid as long as forcible entry was not involved. At that point the court seemed to be developing a clear doctrine. However, the logic in *Wyman* interjected confusion into the developing law. The implication that where the consequences of an administrative search may result in criminal prosecution, the warrant procedure is required, introduced a legal theory which is difficult to reconcile with *Biswell.* There is little doubt that the fruits of an inspection under a gun control statute may produce criminal sanctions, yet warrantless procedure was fully approved in the instant case.

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[36] This statement seems to be a reversion to the civil/criminal distinction of Boyd v. United States, 116 U.S. 616 (1886).

[37] *See* note 24 *supra.*

[38] Justice Blackmun concurred, noting his support of the dissent written by Justice Black in Colonade Catering Corp. v. United States, 397 U.S. 72, 79 (1970).

[39] *See* Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

[40] *See* cases cited note 13 *supra.*

[41] *See* note 24 *supra.*

Another element of uncertainty in *Biswell* is the standard applied in determining whether consent is voluntarily obtained or subtly coerced. This has been discussed primarily in criminal cases, and the Court refused as "inapposite" its own criminal consent standard. Evidently, the Court has held dealers in areas of heavy federal regulation to some type of constructive consent as a prerequisite to doing business in the industry. With Congress continually extending federal control over various segments of the business world, who is to say which industries deal in urgent federal interests? It is submitted that the Supreme Court has become the final arbiter of reasonableness of administrative inspections and will of necessity be required to examine the constitutionality of any federal agency's inspection procedure. The Court has possibly burdened itself with another endless task to be added to its already crowded docket. Justice White acknowledged this theory in *See* by stating:

> Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case by case basis under the general Fourth Amendment standard of reasonableness.[43]

William B. Wicker

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[42] Justice Douglas stated:
There is not the slightest hint in *See* that the government could condition a business license on the consent of the licensee to the administrative searches we held violated the fourth amendment. 400 U.S. 309, 331 (1971).

[43] See v. City of Seattle, 387 U.S. 541, 546 (1967).

Criminal Law—Presumption that Death Occurs Where Body Found is Sufficient to Confer Jurisdiction

Defendant was indicted in a Mississippi court for the murder of a Tennessee resident whose body was found in Mississippi. Although the defendant confessed to the murder,[1] there was uncertainty whether the death occurred in Tennessee, where the shooting took place, or in Mississippi, where the body was found. The trial court on its own motion[2] determined in a pretrial hearing that it did not have jurisdiction over the matter, since the proof did not show beyond a reasonable doubt that the deceased's death occurred in Mississippi. On appeal to the Mississippi Supreme Court, *held,* reversed and remanded. In a criminal prosecution for murder, the presumption that death occurs where a body is found is sufficient to allow the case to go to the jury and to permit the court to assume jurisdiction. *State v. Fabian,* 263 So. 2d 773 (Miss. 1972).

It is fundamental in criminal prosecutions that the accused has a right to be tried in the place where the offense was committed,[3] and that jurisdiction lies solely with the state in which the offense was committed.[4] Problems arise, however, in cases where the offense was committed near a state boundary and specifically in cases where the offense continued from one state to another. In such cases, it must be determined which state has jurisdiction over the offense. In order for one state to assume jurisdiction, it must prove that at least part of the offense was committed within its boundaries. Therefore, proof of venue, the place of the crime, is essential to the state's assumption of jurisdiction.[5] At common law a state had no jurisdiction of an offense consummated within its borders if the offense was commenced in another state.[6] Yet, today, many jurisdictions, including Mississippi, have adopted statutes which have expanded the jurisdictional limitations, and have allowed a state to assume jurisdiction of an offense if it is commenced or consummated within its borders.[7] These statutes are usually remedial in nature, and their object is to extend jurisdiction beyond the boundaries prescribed by common law, thus, preventing a miscarriage of justice.[8] One such statute, which has been adopted in Mississippi, states that in a homicide case, either the mortal stroke or the result of that stroke, death, must have taken place in Mississippi to permit Mississippi to assume jurisdiction.[9] This statute places the burden upon the state to prove the location of either occurrence by the quantum of proof that the law requires in the specific case before the court.[10] In Mississippi the courts have held that venue must be proved beyond a reasonable

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[1] The trial court's refusal of the defendant's motion to suppress his previous confession was appealed. The court in the latter part of its opinion went to great lengths in its discussion of the confession and concluded that the confession was freely and voluntarily given.

[2] Defendant had originally moved to quash the indictment for lack of jurisdiction. The trial court, however, over-ruled this motion when the appellee refused to offer evidence in support of the motion. The lower court then on its own motion inquired into the matter. This court stated that such procedure is novel and unknown in Mississippi criminal procedure. While the court did not entirely exclude such practice, it did say that it must be used only under the most exceptional circumstances and as an exercise of sound judicial discretion.

[3] U.S. Const. amend. VI; Miss. Const. art. 3, § 26; Kisner v. State, 209 Md. 524, 122 A.2d 102 (1956); Murtagh v. Leibowitz, 303 N.Y. 311, 101 N.E.2d 753 (1951). The principle had its origin in the common law institution of trial by jury, for under early English law the jury was composed of witnesses to the crime. The trial was held in the place where the offense occurred because of the convenience of the forum and witnesses and also because the accused would have the benefit of his good character among his neighbors. The principle has continued to be applied not only because of the availability of the witnesses, but also because it acts as a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. The principle was based upon the assumption that the offender would confine his operation to his own neighborhood, however, with the mobility of today's society, the principle has lost much of its merit. State v. Brown, 103 Vt. 312, 154 A. 579, 579-80 (1931); Comment, *Venue in Louisiana Criminal Cases Under Amended Article 13, Code of Criminal Procedure,* 15 La. L. Rev. 757 (1955).

[4] Huntington v. Attrill, 146 U.S. 657 (1892); Stewart v. Jessup, 51 Ind. 413, 19 Am. R. 739 (1875); State v. Kelly, 76 Me. 331, 49 Am. R. 620 (1884); People v.

Devine, 185 Mich. 50, 151 N.W. 646 (1915); State v. Kief, 12 Mont. 92, 29 P. 654 (1892); State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892); State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); Ex Parte McNeely, 36 W. Va. 84, 14 S.E. 436 (1892).

[5] *See* Norris v. State, 143 Miss. 365, 108 So. 809 (1926); Dorsey v. State, 141 Miss. 600, 106 So. 827 (1926); Quillen v. State, 106 Miss. 831, 64 So. 736 (1914). While jurisdiction and venue are closely related in criminal cases, they are distinguishable. Jurisdiction refers to a state's judicial power to try a case; venue refers to the particular place within a state in which a case may be tried. In criminal cases venue is the place where the offense was committed. In the instant case, we are dealing primarily with the broader question of jurisdiction, and specifically with the question of whether Mississippi may assume jurisdiction over the case. In order for Mississippi to obtain jurisdiction, there must be proof that the crime, or an essential part of the crime, occurred within the state. Normally this proof is established when the prosecution presents evidence as to the location of the offense which results in proof of venue. Therefore, venue is an essential part of jurisdiction which must be proved for jurisdiction to be complete. It should be remembered when the court speaks of venue in the instant case, that it is in reference to venue as *part* of jurisdiction.

[6] Brown v. State, 108 Ala. 18, 18 So. 811 (1895), *overruled in* Amos v. State, 123 Ala. 50, 26 So. 524 (1898); De Graffenried v. State, 28 Ala. App. 291, 182 So. 482 (1938).

[7] An example of this expansion of venue is found in MISS. CODE ANN. §§ 2427 & 28 (1956). As a result of these statutes, the Mississippi courts are allowed to assume jurisdiction if the offense is commenced or consummated in this state.

[8] Robinson v. Commonwealth, 217 Ky. 129, 288 S.W. 1044 (1926); People v. Licenziata, 199 App. Div. 106, 191 N.Y.S. 619 (1921); People v. Vario, 165 Misc. 842, 2 N.Y.S.2d 611 (1938).

[9] MISS. CODE ANN. § 2430 (1956).

[10] Isabel v. State, 101 Miss. 371, 58 So. 1 (1912).

doubt and to the exclusion of every other reasonable hypothesis.[11] Several jurisdictions have held that a presumption that the death occurred where the body was found is sufficient to meet the degree of proof required for venue.[12] Yet in several of these jurisdictions the degree of proof required is merely a preponderance of the evidence, and proof is not required to be beyond a reasonable doubt.[13] Previously, this presumption had never been discussed by the Mississippi courts.

In the instant case the court stated that factual questions of venue are for determination by the jury. It further recognized that in Mississippi, proof of venue is essential for jurisdiction, and reviewed the law in Mississippi pertaining to the degree of proof necessary for venue. Two presumptions were adopted by the court: (1) death occurs where the body is found; and (2) life continues until there is evidence to the contrary.[14] The court concluded that a trial judge need only determine that there is competent and relevant evidence supporting venue to allow the question to go to the jury. Therefore, in the instant case, the trial court should have allowed the jury to determine the factual question of where the death occurred. The court also concluded that the rebuttable presumption that death occurs where the body is found established a prima facie case for the prosecution, and since no evidence was produced to the contrary, the trial court may assume jurisdiction of the case.

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[11] In Poore v. State, 205 Miss. 528, 37 So. 2d 3 (1948), *suggestion of error overruled,* 205 Miss. 528, 37 So. 2d 357 (1948), *cert. denied,* 336 U.S. 992 (1948), *rehearing denied,* 336 U.S. 1947 (1948), the Mississippi Supreme Court held that venue could be proved by either direct or circumstantial evidence. The general rule for criminal prosecutions in Mississippi requires that venue be proved beyond a reasonable doubt. When venue is shown by circumstantial evidence, however, it must be shown to the exclusion of every other reasonable hypothesis. Jackson v. State, 246 So. 2d 553 (Miss. 1971); Turner v. State, 220 So. 2d 295 (Miss. 1969); Jones v. State, 230 Miss. 887, 94 So. 2d 234 (1957); Clark v. State, 230 Miss. 143, 92 So. 2d 452 (1957); Crum v. State, 216 Miss. 780, 63 So. 2d 242 (1953); Whitten v. State, 189 Miss. 809, 199 So. 74 (1940); Kitchens v. State, 186 Miss. 443, 191 So. 116 (1939); Ussery v. State, 154 Miss. 704, 123 So. 854 (1929); Dorsey v. State, 141 Miss. 600, 106 So. 827 (1926).

[12] These jurisdictions include the following:

California, People v. Kamaunu, 110 Cal. 609, 42 P. 1090 (1895); *Maryland,* Breeding v. State, 220 Md. 193, 151 A.2d 743 (1959); *Massachusetts,* Commonwealth v. Knowlton, 265 Mass. 382, 163 N.E. 251 (1928); *Nebraska,* Hawkins v. State, 60 Neb. 380, 83 N.W. 198 (1900); *New Hampshire,* State v. Forbes, 75 N.H. 306, 73 A. 929 (1909); *New Jersey,* State v. McDowney, 49 N.J. 471, 231 A.2d 359 (1967); *New Mexico,* State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); *New York,* N.Y. CRIM. PRO. § 20.20 (2A) (McKinney 1971); *Ohio,* State v. Dean, 90 Ohio App. 398, 106 N.E.2d 303 (1951); *Tennessee,* Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945).

[13] Of the ten jurisdictions which have adopted the presumption that death occurs where the body is found, four—Tennessee, California, New Mexico, and New York—adhere to the view that venue of the crime need be proved only by a preponderence of the evidence. These jurisdictions also adhere to the idea that venue is a jurisdictional fact rather than an element of the offense. On the other hand, the view held by two of the jurisdictions—Nebraska and Ohio—is that venue of the crime must be proved beyond a reasonable doubt. The remaining four jurisdictions which have adopted the presumption—Massachusetts, Maryland, New Hampshire, and New Jersey—have not spoken on the degree of proof needed to prove venue. It is interesting to note that the two jurisdictions where the presumption is the most firmly established—Massachusetts and Maryland—have not spoken on the necessary amount of proof.

[14] The validity of the presumption is generally accepted throughout the country. *See, e.g.,* C. MCCORMICK, THE HANDBOOK OF THE LAW OF EVIDENCE 642 (1954); 9 J.

The problems of proof which are present in a jurisdictional boundary case are often quite complicated, and the possibility that a criminal may escape punishment should not be overlooked. The criminal's right to have the prosecution brought in the place where the crime was committed and to be governed by that state's law is a well-settled principle,[15] however, in order to assure justice, the public's needs must also be considered. The possibility that a criminal may escape punishment merely because the place of the offense is in doubt[16] is in direct conflict with the public need for strict law enforcement and the punishment of criminal offenders. Section 2419 of the Mississippi Code solves the problem within this state by eliminating the requirement that venue be proved beyond a reasonable doubt where there is a conflict of evidence as to the county in which the offense was committed.[17] Yet the court held that this statute is non-applicable between states.[18] The logic on which the statute is based, however, remains. Perhaps this logic, which eliminated the strict degree of proof of venue within the state, should be applied between the states.[19] In the instant case the court dealt with

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WIGMORE, WIGMORE ON EVIDENCE 462 (3d ed. 1940), Allen v. Mazurowski, 317 Mass. 218, 57 N.E.2d 544, 545 (1944).

[15] *See* note 15 *supra*. The defendant's rights would not be jeopardized by his being tried in either jurisdiction. The basis for the principle that a person be tried in the place where the crime was committed would not apply to the defendant in this case, for he would be considered a foreigner in both Tennessee and Mississippi. The only possible way his rights could be affected would be if the laws of the two states were wholly dissimilar.

[16] In the instant case there is a possibility that Tennessee could not assume jurisdiction, since Tennessee law presumes the homicide to occur where the body is found. Because of this presumption, the Attorney General of Shelby County, Tennessee, initially refused jurisdiction over the case. The better view favors the probability that Tennessee could have assumed jurisdiction. TENN. CODE ANN. § 40-103 (1955), provides that when an offense is commenced within Tennessee and consummated outside the state, the offender is subject, to the jurisdiction of Tennessee, and venue lies in the county where the offense was commenced. In spite of the Tennessee presumption that the homicide occurs where the body is found, evidence to the contrary can rebut this presumption. Moreover, since Tennessee requires that venue be proved merely by a preponderence of the evidence, the defendant's confession that he shot the deceased in Tennessee, should be sufficient to rebut the presumption and allow Tennessee to assume jurisdiction.

[17] Presley v. State, 217 Miss. 112, 63 So. 2d 551, 555 (1950).

[18] *Id.*

[19] Perhaps the reason this court held that MISS. CODE ANN. § 2419 (1956), was not applicable between states was because of its reluctance to extend the traditional

the problem in a different manner by alleviating the prosecution's burden of proof. By adopting the presumption that death occurs where the body is found, the court has greatly simplified the burden of producing sufficient evidence to satisfy the venue requirement in a criminal prosecution. It now appears that this presumption will be sufficient to establish a prima facie case of venue. Yet since this presumption is rebuttable, any contrary evidence will allow the question of venue to be determined by the jury. A disturbing question arises as to whether this presumption is sufficient, or should be sufficient, to prove venue beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. The very nature of a presumption seems to defy this conclusion.[20] Yet the adopted presumption is logical and should help solve the problems in boundary-line jurisdictional questions which may arise in the future. Since Mississippi still retains the strict requirement for proving venue in state boundary cases, the presumption will be a workable solution to help preclude the possibility of a grave injustice to our society.

George Fair

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boundaries of state jurisdiction. The state boundaries have always been considered the limit of a state's jurisdiction; however, in some instances these limits have been extended to eliminate possible boundary-line jurisdictional problems. The defendant's rights, as discussed in note 15, *supra,* would not be affected to any extent if the jurisdictional limitations were extended in the instant case. Yet the public's interest may definitely be affected if a solution to the instant jurisdictional problem is not found. The public's interest in such a situation is paramount and should be met. In MISS. CODE ANN. § 2430 (1956), the legislature provided that Mississippi could assume jurisdiction in a homicide case if the offense was commenced or consummated in this state. It is certainly reasonable that this statute could be extended to allow concurrent jurisdiction between states in cases where the venue is doubtful. Perhaps this was the legislature's intent.

[20] The fact that a presumption is nothing more than a probable or natural explanation from which the courts have concluded a resulting rule of law tends to discredit the absolute certainty of a presumption. *See* Comment, *Presumptions; Their Use and Abuse,* 17 MISS. L.J. 1 (1945). The fact that Mississippi requires venue to be proven beyond a reasonable doubt and to the exclusion of every other hypothesis appears to require some degree of certainty in proving venue. The question therefore presents itself as to whether a presumption alone or in conjunction with other evidence assures the degree of certainty needed to meet the required standard. There could certainly be other reasonable hypotheses in the present case in conflict with the presumption that death occurred where the body is found. It is reasonable that the body could have been deposited at a place different than that of the death in order to escape detection by the authorities. This hypothesis alone may be sufficient to cause the presumption to fail to meet Mississippi's strict standard of proof.

LIMITATION OF ACTION IN MISSISSIPPI — RIGHT AS WELL AS REMEDY TERMINATED FOR RECOVERY OF PRINCIPAL AND COLLATERAL SECURITY

Appellant's husband assigned a life insurance policy to the appellee as security for a debt. At the time of the husband's death, the statute of limitations on the debt had run. Proceeds of the policy were paid into the registry of the court; appellant and appellee were interpleaded. Appellant raised the statute of limitations as a bar, but the court found that the statute of limitations did not bar appellee's recovery because the assignment had the effect of a pledge,[1] and appellee was entitled to recover the proceeds. On appeal the Mississippi Supreme Court, *held,* reversed and rendered. Section 743[2] of the code provides that completion of the period of limitation on a legal obligation shall terminate the right as well as the remedy; therefore a debtor-creditor relationship is extinguished by the running of the statute of limitations. *Hawkins v. Southern Pipe and Supply Co.,* 259 So. 2d 696 (Miss. 1972).

The development of limitations of actions has been slow and deliberate, beginning in Roman law at an early date.[3] England's first statutes were enacted in 1236, but "[t]he Limitations Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law."[4] The purpose of the early common law statutes was to discourage the litigation of stale claims, the rationale being that after passage of a substantial period of time the relevant facts would be forgotten, essential evidence would be lost, or witnesses would be dead or unavailable.[5] General statutes of limitation are interpreted as being remedial only and do not affect[6] substantial rights of parties. The general rule, accepted by all but two jurisdictions[7] that have spoken on the issue, is that pure statutes of limitations extinguish neither the right nor the jurisdiction of the court over the subject matter.[8] Wisconsin and Mississippi both hold that when the statute of limitations runs on a legal obligation, the right as well as the remedy is extinguished. The Wisconsin rule is based on a long line of decisions,[9] while in Mississippi the rule is statutory:

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[1] A pledge is defined as:

> [A] security interest in a chattel or in an intangible represented by an indispensable instrument, the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some other duty. RESTATEMENT OF SECURITY § 1 (1941).

[2] MISS. CODE ANN. § 743 (1956).

[3] *See Developments In The Law—Statutes of Limitation,* 63 HARV. L. REV. 1177 (1950).

[4] *Id.* at 1178.

[5] 6A A. CORBIN, CORBIN ON CONTRACTS § 1377 (1962).

[6] *See, e.g.,* Equity Corporation v. Groves, 53 A.2d 505 (Del. Ch. 1947); Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959); Oberg v. McComb, 127 Ind. App. 278, 141 N.E.2d 135 (1957); Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926).

[7] *Alabama*—Ellis v. Black Diamond Coal Mining Co., 265 Ala. 264, 90 So. 2d 770 (1956); *California*—Mitchell v. Sanitation Dist. No. One, 150 Cal. App. 2d 366, 309 P.2d 930 (1957); *Colorado—In re* Randall's Estate, 166 Colo. 1, 441 P.2d 153 (1968); *Connecticutt*—M-A-C Loan Plan Inc. v. Schabel, 6 Conn. Cir. 78, 265 A.2d 620 (1969); *Delaware*—Equity Corp. v. Groves, 53 A.2d 505 (Del. Ch. 1947); *Florida*—Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956); *Georgia*—Hawes v. Shuman, 125

> The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.[10]

The Mississippi Supreme Court has been consistent in strictly construing this statute.[11] The barred debt, however, was not at issue in the instant case. In dispute was the collateral security.

Ga. App. 117, 186 S.E.2d 582 (1971); *Idaho*—Joseph v. Darrar, 93 Idaho 762, 472 P.2d 328 (1970); *Illinois*—Lavine v. Unruh, 99 Ill. App. 2d 94, 240 N.E.2d 521 (1968); *Indiana*—Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959); *Kansas*—Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957); *Kentucky*—Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. 1965); *Maryland*—Fowler v. A. & A. Co., 262 A.2d 344 (D.C. Ct. App. 1970); *Michigan*—Devries v. Alger, 329 Mich. 68, 44 N.W.2d 872 (1950); *Missouri*—Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950); *Montana*—Stranahan v. City of Harve, 112 Mont. 591, 119 P.2d 629 (1942); *North Carolina*—Williams v. Thompson, 227 N.C. 166, 41 S.E.2d 359 (1947); *New Hampshire*—Smith v. Turner, 91 N.H. 198, 17 A.2d 87 (1941); *New Jersey*—Miller v. Board of Chosen Freeholders, 10 N.J. 398, 91 A.2d 729 (1952); *New Mexico*—Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946); *New York*—Allstate Ins. Co. v. Consolidated Mut. Ins. Co., 35 App. Div. 2d 535, 313 N.Y.S.2d 181 (1970); *Ohio*—Collins v. Nuree, 20 Ohio App. 2d 53, 251 N.E.2d 621 (1969); *Oklahoma*—Smith v. Citizens Nat'l Bank, 313 P.2d 505 (Okla. 1957); *South Carolina*—Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956); *South Dakota*—Davison v. Sasse, 72 S.D. 199, 31 N.W.2d 758 (1948); *Tennessee*—Hackworth v. Ralston Purina Co., 214 Tenn. 506, 381 S.W.2d 292 (1964); *Texas*—Cockrell v. Craugh, 338 S.W.2d 516 (Tex. Civ. App. 1960); *Virginia*—Page v. Shenandoah Life Ins. Co., 185 Va. 919, 40 S.E.2d 922 (1947).

[8] Collins v. Nurre, 20 Ohio App. 2d 53, 251 N.E.2d 621 (1969).

[9] Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 877 (1963); Reistad v. Manz, 11 Wis. 2d 155, 105 N.W.2d 324 (1960); First Nat'l Bank of Madison v. Kolbeck, 247 Wis. 462, 19 N.W.2d 908 (1945); Long v. Mates, 219 Wis. 414, 263 N.W. 371 (1935); Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N.W. 433 (1899); Pierce v. Seymour, 52 Wis. 272, 9 N.W. 71 (1881).

[10] MISS. CODE ANN. § 743 (1956). This statute was enacted as § 2685 of the Code of 1880. It has been brought forward unchanged in every succeeding Code: Code of 1892, § 2755; Code of 1906, § 3115; Hemmingway's Code of 1917, § 2479; Code of 1930, § 2313.

[11] Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926); Rogers v. Rosenstock, 117 Miss. 144, 77 So. 958 (1918); Wade v. Barlow, 99 Miss. 33, 54 So. 662 (1911); Trowbridge v. Schmidt, 82 Miss. 475, 34 So. 84 (1903); Proctor v. Hart, 72 Miss. 288, 16 So. 595 (1895).

As a security interest, a pledge[12] should not terminate by the running of the statute of limitations on the principal, even when the statute is interpreted as extinguishing the debt, unless the statute specifically provides that the security interest is extinguished with the debt.[13] Mississippi has a statute directed at mortgages stating that an action can be brought on a lien, mortgage, or deed of trust within the time that is allowed for commencement of an action on the principal.[14] The case law indicates that this statute is also strictly construed.[15]

The court in the instant case found that the stated purpose of the assignment was to secure such indebtedness as might have existed at the time of the settlement of the policy. The court also found that the statute of limitations had run on the principal debt, and in Mississippi when the statute runs, the debt is completely extinguished.[16] Therefore, the court held that there was no indebtedness existing at the time of the settlement of the policy; thus, the assignment expired under its own terms.

The Supreme Court of New Jersey has stated that a statute which operates on the remedy and does not extinguish the right reduces the right to a mere moral obligation, and that "a right without a remedy is a mere shadow."[17] This is not altogether true, because even though the creditor is prohibited from seeking a judicial remedy, there are nonjudicial collateral remedies which may be employed by the creditor except where specifically barred by statute.[18] The fact that pledged property securing a barred debt is not affected by the statute of limitations has already been mentioned.[19] A mortgagee may be able to forclose a mortgage in a court of equity "since the limitation is considered to bar only the debt."[20] In addition, the mortgagee can hold a nonjudicial sale where the mortgage instrument authorizes one, or he may frustrate the mortgagor by not allowing him to clear title to the property until the debt is paid.[21] The creditor may proceed against the child of the debtor in the division of the estate.[22] Finally, the creditor can use the "self-help" doctrine by using reasonable force to repossess chattels.[23] Although the "self-help" doctrine must be used while in "fresh pursuit," an interesting issue would be raised if the creditor did take possession of the property, because statutes of limitation cannot be used by the debtor as the basis for affirmative relief.[24] Even though these nonjudicial collateral remedies are cumbersome, it is clear that the right is not emasculated when the remedy is extinguished.

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[12] *See* definition, *supra* note 1.

[13] Restatement of Security § 47, comment *a* at 136, 137 (1941).

[14] Miss. Code Ann. § 719 (1956).

[15] State v. Magnolia Bank, 212 Miss. 47, 53 So. 2d 79 (1951); Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950); Gates v. Chandler, 174 Miss. 815, 165 So. 442 (1936); Musser v. First Nat'l Bank of Corinth, 165 Miss. 873, 147 So. 783 (1933); McDaniel v. Short, 127 Miss. 520, 90 So. 186 (1921).

[16] Miss. Code Ann. § 743 (1956).

[17] State v. Standard Oil Co., 5 N.J. 281, 74 A.2d 565, 571 (1950).

[18] *See Developments In The Law—Statutes of Limitation, supra* note 3, at 1248.

[19] *See* Restatement of Security, *supra* note 12.

[20] *See Developments In The Law—Statutes Of Limitation, supra* note 2, at 1247.

[21] *Id.* at 1248.

[22] Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926).

[23] *See Developments In The Law—Statutes Of Limitation, supra* note 2, at 1249.

The status of a security interest or pledge other than a lien, mortgage, or deed of trust, remains unsettled in Mississippi. Section 719 of the Mississippi Code and the court in *Perkins v. White* make it clear that liens, mortgages, and deeds of trust do not survive the debts secured by them.[25] The court in the instant case did not construe § 719 to extend to pledges and other security interests. It merely applied § 743 to the language of the assignment itself and held that by its own terms the assignment was barred.[26] The court makes no clear pronouncement, but its use of *Perkins* in the instant case indicates a willingness to construe § 719 to include security interests that are not so limited by the language of their creation.

Luther S. Ott

PUBLIC OFFICIALS — FEDERAL FELONY CONVICTION DOES NOT DISQUALIFY STATE LEGISLATOR FROM HOLDING OFFICE

Plaintiff[1] filed a petition for a writ of quo warranto[2] to question defendant's authority to hold the position of Mississippi state senator. Plantiff contended that under the terms of the Mississippi Constitution of 1890[3] defendant was precluded from holding office, having been convicted of a felony[4] in the United States District Court for the Southern District of Mississippi. Defendant filed a general demurrer[5] to the petition which was sustained and the petition was dismissed. On appeal to the Mississippi Supreme Court, *held,* affirmed. The constitutional provision barring those convicted of "infamous crimes"[6] from serving in the state legislature has reference only to such convictions in the state courts of Mississippi. *State ex rel. Muirhead v. State Bd. of Elec. Comm'rs.* 259 So. 2d 698 (Miss. 1972).

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[24] *Id.*

[25] MISS. CODE ANN. § 719 (1956); Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

[26] Hawkins v. Southern Pipe and Supply Co., 259 So. 2d 696 (Miss. 1972).

[1] Plaintiff was the incumbent senator from the district in which defendant was elected.

[2] The writ shall be brought in the name of the state "[W]henever any person unlawfully holds or exercises the functions of any public office . . . ." MISS. CODE ANN. § 1120 (1956).

[3] MISS. CONST. art. 4, § 44, provides: "No person shall be eligible to a seat in either house of the legislature, or to any office of profit or trust, who shall have been convicted of bribery, perjury, or other infamous crime . . . ."

[4] Defendant had pleaded guilty to a five count indictment charging him with possession and operation of an unregistered still and concealment of tax due and unpaid on whiskey in unstamped containers. MISS. CODE ANN. § 2632 (1956) also classifies possession of a still as a felony.

[5] A general demurrer to a petition for a writ of quo warranto admits all the allegations well pleaded therein. State *ex rel.* Collins v. Senatobia Blank Book & Stationary Co., 115 Miss. 254, 76 So. 258 (1917).

That no state will punish one for violations of the criminal law of a foreign jurisdiction is a universally recognized rule of law.[7] However, disqualifications that accompany conviction of certain crimes are not considered a form of punishment, but merely a resultant loss of privilege.[8] Provisions similar to the one around which the instant litigation revolves are found in many state constitutions.[9] The court's interpretation of such prohibitions are divided over whether a felony conviction in federal court results in the loss of state granted privileges. One view is that such a conviction works no disqualification.[10] Such decisions follow the general rule that disqualification statutes are to be strictly construed.[11] These cases share the theme that the right of the individual state to expound its own laws and to restrict the privileges of its citizens should not be based on convictions rendered by foreign courts.[12] In support of this view it is argued that a matter as serious as loss of state-granted privilege should only result from a state court proceeding.[13] This view has been similarly applied in cases involving capacity to be executor of a will;[14] to testify in court;[15] to sit on a jury;[16] and to practice law.[17] There are, however, an impressive number of cases holding otherwise.[18] Several of these cases have pointed out that a reasonable interpretation of this type of provision dictates the inclusion of federal as well as state convictions.[19] The decision in *State ex rel. Olson v. Langer*[20] was based not only on the "logical interpretation" of the statute, but on holdings involving analogous statutes dealing with disbarment of attorneys, which, almost without exception,[21] have held conviction in federal court or in the courts of another state sufficient for removal from the state bar.[22] The Mississippi Supreme Court has twice dealt with the effect of a federal conviction on state-granted privilege. In *Jones v. Board of Registrars,*[23] the court attached no significance to the fact that appellant had been convicted in a federal court rather than a Mississippi court in determining that a pardon would restore appellant's lost franchise privilege. Later in *State ex rel. Mitchell v. McDonald,*[24] the court held that a felony conviction in federal court[25] would not bar appellee from holding office within the state, and in doing so made no mention of *Jones.*[26]

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[6] Miss Code Ann. § 680 (1956) defines infamous crime as any offense punishable by death or imprisonment in the penitentiary.

[7] Restatement of Conflicts § 427 (1934).

[8] 83 U. Pa. L. Rev. 386 (1935).

[9] *See, e.g.,* Ala. Const. art. 4, § 60; Ark. Const. art. 5, § 9; Ga. Const. art. II, § 2; Iowa Const. art. 2, § 5; Mont. Const. art. IX, § 2; N.C. Const. art. 6, § 8; Okla. Const. art. 3, § 1; Tex. Const. art. 16, § 2; W. Va. Const. art. 6, § 14.

[10] *See, e.g.,* People v. Enlow, 135 Colo. 249, 310 P.2d 539 (1957); Crothers v. Jones, 239 La. 800, 120 So. 2d 248 (1960); State *ex rel.* Mitchell v. McDonald, 164 Miss. 405, 145 So. 508 (1933); Isaacs v. Board of Ballot Comm'rs, 122 W. Va. 703, 12 S.E.2d 510 (1940); *cf.* Hildreth v. Heath, 1 Ill. App. 82 (1878).

[11] 48 Harv. L. Rev. 687 (1935).

[12] *See* cases cited note 10 *supra.*

[13] Isaacs v. Board of Ballot Comm's, 122 W. Va. 703, 12 S.E.2d 510 (1940).

[14] Garitee v. Bond, 102 Md. 379, 62 A. 631 (1905).

[15] Campbell v. State, 23 Ala. 44 (1853); Commonwealth v. Green, 17 Mass. 514 (1822).

[16] Queenman v. Oklahoma, 111 Okla. 261, 71 P. 218 (1901).

[17] *In re* Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

[18] *See, e.g.,* State *ex rel.* Moore v. Blake, 225 Ala. 124, 142 So. 418 (1932); People *ex rel.* Keenan v. McGuane, 13 Ill.2d 520, 150 N.E.2d 168 (1958); State *ex rel.* Dean v. Haubrich, 248 Iowa 978, 83 N.W.2d 451 (1957); Cowan v. Prowse, 39 Ky. 156, 19 S.W. 407 (1892); State *ex rel.* Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); State *ex rel.* Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791 (1932); State *ex rel.* Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934); *cf.* Arnett v. Stumbo. 287 Ky. 433, 153 S.W.2d 889 (1941). *See also* Jones v. Board of Registrars, 56 Miss.

In the instant case, the court observed that the interpretation of words found in the constitution was exclusively within the judicial province, and that statutory definitions, while reflective of legislative intent, were not controlling. Relying on *Daughdrill v. Daughdrill*[27] the court stated that the phrase "in the penitentiary," as used in the statutory definition of "infamous crime,"[28] means only the Mississippi State Penitentiary. The court cited with approval the reasoning in *State ex rel. Mitchell v. McDonald,*[29] *Gutterman v. State,*[30] and *Isaacs*

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766 (1879); State *ex rel.* Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891 (1930).

[19] Cowan v. Prowse, 39 Ky. 156, 19 S.W. 407 (1892); *accord,* Irby v. Day, 182 Ark. 595, 32 S.W.2d 157 (1930); *c.f.* Barnes v. District Ct. of App., 178 Cal. 500, 173 P. 1100 (1918).

[20] 65 N.D. 68, 256 N.W. 377 (1934).

[21] *In re* Ebbs, 150 N.C. 44, 63 S.E. 190 (1908) (conviction in federal court insufficient for disbarment). The statute was changed in 1927 to include all convictions.

[22] *E.g., In re* Higbe, 99 Cal. Rptr. 865, 493 P.2d 97 (1972); *In re* Kerl, 32 Idaho 237, 188 P. 40 (1920); *In re* Peters, 73 Mont. 284, 235 P. 772 (1925); *In re* Hodgskin, 193 App. Div. 217, 183 N.Y.S. 401 (1920); *In re* Finch, 136 Wash. 609, 287 P. 677 (1930); *In re* Comyns, 132 Wash. 391, 232 P. 269 (1925); *cf.* Seitz v. Ohio Med. Bd., 24 Ohio App. 154, 157 N.E. 304 (1926) (conviction in federal court sufficient for revocation of medical license).

[23] 56 Miss. 766 (1879) (decision based on assumption that federal court conviction resulted in loss of state granted franchise privilege).

[24] 164 Miss. 405, 145 So. 508 (1933).

[25] Appellee had been convicted of perjury by a federal court in Louisiana.

[26] Jones v. Board of Registrars, 56 Miss. 66 (1879).

[27] 180 Miss. 589, 178 So. 106 (1938). The court was interpreting the words as they appeared in a statute dealing with grounds for divorce; *accord,* Crothers v. Jones, 239 La. 800, 120 So. 2d 248 (1960).

[28] MISS. CODE ANN. § 680 (1956). For terms of statute *see* note 6 *supra.*

[29] 164 Miss. 405, 145 So. 508 (1933).

[30] 141 So. 2d 21 (Fla. 1962).

v. Board of Ballot Commissioners[31] in rejecting appellant's contention that the constitutional prohibition should apply to the conviction in issue.

The court's failure to consider the underlying policy factors behind the constitutional provision creates a potentially anomalous situation. Clearly the policy motivating the enactment of this disqualification provision was to bar from public office those whose past actions reflect an unworthiness of public trust.[32] When dealing with this area of law the courts have, almost without exception,[33] limited themselves to adopting one of two views. The first is the "foreign court" view which relies on decisions interpreting analogous disqualification statutes dealing with the capacity to testify.[34] This view fails to recognize that the policy behind allowing felons convicted in other jurisdictions to testify is to prevent the exclusion of relevant testimony, and to circumvent an unpopular rule,[35] not an unwillingness to extend the effect of the foreign conviction to the disadvantage of the witness.[36] The second is the "logical interpretation" view which relies on cases interpreting analogous statutes dealing with disbarment proceedings.[37] While the argument has been made that public officials should be held to a standard no lower than that required of attorneys,[38] this view fails to recognize that courts have the inherent power to discipline and regulate attorneys as officers of the court.[39] It also fails to consider that many disbarment cases are based not on convictions of infamous crimes but on acts involving "moral turpitude,"[40] a much broader term.[41] By strict application of the "foreign court" concept the view of the court in the instant case, a public official of the state of Mississippi could be convicted of embezzlement in federal court and remain free to hold public office within the state even though his past conduct clearly indicates an unworthiness of public trust. By contrast, a strict application of the "logical interpretation" view would bar one from public office for conviction of a felony in federal court although the substantive offense of which he was convicted was treated as a misdemeanor, or no crime at all, in the jurisdiction which now bars him from public office. Because of the possibilty of such absurd results achieved by the strict application of the two views above, the courts should ignore altogether the jurisdiction of the court of conviction. The fact that the conviction was rendered by a federal court or the court of another state has no relation to the policy consideration involved. The sole criterion should be whether the offense is considered an infamous crime under the laws of the jurisdiction imposing the disqualification.[42] Under this formula the true policy behind the constitutional prohibition would be given full effect.

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[31] 122 W. Va. 703, 12 S.E.2d 510 (1940).

[32] 49 HARV. L. REV. 157, 158 (1935); 83 U. PA. L. REV. 386, 387 (1935). *See* State *ex rel.* Barrett v. Sartorious, 351 Mo. 1237, 175 S.W.2d 787 (1943); *In re* Peters, 73 Mont. 284, 235 P. 772 (1925); Chase v. Blodgett, 10 N.H. 22 (1838).

[33] *See* Gutterman v. State, 141 So. 2d 21 (Fla. 1962) (appellant not barred from office for conviction of felony in foreign jurisdiction because offense not a felony under Florida law); State v. Biggs, 52 Ore. 433, 97 P. 713 (1908) (appellee not disbarred for federal felony conviction where offense unknown to state law).

[34] Logan v. United States, 144 U.S. 263 (1892); Commonwealth v. Green, 17 Mass. 515 (1822); Weber v. Oklahoma, 18 Okla. 421, 195 P. 510 (1921). *But see* Campbell v. Alabama, 23 Ala. 44 (1853); State v. Chandler, 10 N.C. (3 Hawks) 393 (1824); Chase v. Blodgett, 10 N.H. 22 (1838).

[35] Most states have removed this common law disqualification or restricted it by legislation. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 141, 142 (1954).

[36] *See* 83 U. PA. L. REV. 386, 387 (1935).

[37] *See* cases cited note 22 *supra.*

[38] 29 ILL. L. REV. 945, 946 (1935).

[39] *In re* Cohan, 261 Mass. 484, 159 N.E. 495 (1928); *In re* Mussman's Case, 286 A.2d 614 (N.H. 1971); Allgeier v. Johnson, 421 Pa. 342, 219 A.2d 593 (1966).

[40] *E.g.,* State v. Bieber, 121 Kan. 536, 247 P. 875 (1926) (disbarred for misdemeanor of possession of liquor); *In re* Hicks, 163 Okla. 29, 20 P.2d 896 (1933) (disbarred for illicit sexual behavior). *See In re* Dickens, 67 Pa. 169 (1870) (the disbarment need not be based on an indictable offense). *See generally* 7 C.J.S. *Attorney and Client* §§ 19, 20 at 733-734 (1937); 7 AM. JUR. 2d *Attorneys at Law* §§ 24, 25 at 57 (1963).

Stephen L. Thomas

PUBLIC WELFARE — A STATE MAY PROVIDE LOWER BENEFITS TO AFDC RECIPIENTS THAN TO WELFARE RECIPIENTS IN OTHER FEDERALLY AIDED ASSISTANCE PROGRAMS

Petitioners, recipients of Aid to Families with Dependent Children (AFDC), brought a class action challenging the specific computation procedures used in determining the level of benefits allocated to recipients under the welfare program. Seeking injunctive and declaratory relief against state welfare officials, petitioners charged that the percentage reduction system used by the state violated the Social Security Act[1] and the equal protection clause of the fourteenth amendment.[2] Respondents claimed that the state plan was a rational method of allocating limited funds between the several federally aided "categorical

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[41] 29 ILL. L. REV. 945, 946 (1935). *See Calzada v. Sinclair,* 6 Cal. App. 3d 903, 915, 86 Cal. Reptr. 387, 394 (1970) (defines moral turpitude as any conduct "contrary to justice, honesty and good morals"); *cf. In re* Monaghan, 222 A.2d 665 (Vt. 1966).

[42] *Accord,* Gutterman v. State, 141 So. 2d 21, 85 (Fla. 1962); Chase v. Blodgett, 10 N.H. 22, 31 (1838), State v. Biggs 52 Ore. 433, 97 P. 713, 714 (1908) (based on classification of crime in jurisdiction seeking to impose disqualification, not the classification in jurisdiction of conviction). *But see* State *ex rel.* Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791, 793 (1932); State *ex rel.* Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891, 892 (1930) (considered the difference in the classification but ruled the classification of the court of conviction to be controlling). *See also* 2 U. CHI. L. REV. 333, 334 (1935); 49 HARV. L. REV. 157, 158 (1935).

[1] Social Security Act § 402 (a) (23), 49 Stat. 620 (1935), *as amended,* 42 U.S.C. § 602 (a) (23) (1970).

[2] U.S. CONST. amend. XIV.

assistance" programs.[3] A three judge federal court[4] granted relief to petitioners, declaring that the percentage reduction system was a violation of the Social Security Act, but rejected the constitutional claim.[5] Subsequently, the United States Supreme Court upheld the use of the percentage reduction system.[6] Therefore, on respondents' direct appeal to the United States Supreme Court, the judgement was vacated and remanded.[7] On remand, the district court *denied all relief to petitioners.* On appeal to the United States Supreme Court, *held* (5-4), affirmed.[8] States may apply a lower percentage reduction factor to AFDC recipients because a state is not required to provide equal benefits to all recipients of aid under federally aided welfare programs. *Jefferson v. Hackney,* 92 S. Ct. 1724 (1972).

AFDC is one of four federally aided "categorical assistance" programs established under the Social Security Act of 1935.[9] Although the AFDC program is financed by the federal government in cooperation with the states, it is administered by the individual states. All states have elected to participate in the program,[10] and each state has been given significant latitude in administering its program and in determining the level of benefits to be paid.[11] Each state computes its own "standard of need" for an eligible family and then decides how much assistance is to be given in relation to the "standard of need." Some states provide every eligible family with benefits sufficient to meet the full "standard of need,"[12] while others with more limited budgets[13] allocate their funds to provide a percentage of determined need.[14] In calculating the benefits to be provided, when AFDC funds are limited, the state applies a percentage reduction factor or establishes a statutory maximum on the level of benefits.[15] Both systems, the "percentage reduction" and the "maximum grant," have been challenged and upheld by the courts.[16] The 1968 amendment to the Social Security Act required the states to adjust their "standard of need" to reflect the rise in living costs.[17] Any state with a miximum grant system was required to raise the statutory maximum to accomplish this adjustment.[18] The State of Texas chose to convert from a maximum grant system to a percentage reduction plan.[19] As a consequence, some AFDC recipients found that their benefits were reduced under the new plan. In *King v. Smith*[20]

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[3] The four categorical assistance programs are: Old Age Assistance (OAA), 42 U.S.C. § 301 *et seq.* (1970); Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 601 *et seq.* (1970); Aid to the Blind (AB), 42 U.S.C. § 1201 *et seq.* (1970); Aid for the Permanently Disabled (APTD), 42 U.S.C. § 1351 *et seq.* (1970).

[4] 28 U.S.C. § 2281 (1970).

[5] Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

[6] Rosado v. Wyman, 397 U.S. 397 (1970).

[7] Jefferson v. Hackney, 397 U.S. 821 (1970).

[8] Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger, and Justices White, Blackmun, and Powell joined. Dissenting were Justices Douglas, Brennan, Marshall, and Stewart.

[9] Social Security Act § 402(a) (23), 49 Stat. 620 (1935), *as amended,* 42 U.S.C. § 601-09 (1970).

[10] Note, *Redefining Federal Largess Through State Maximum Grant Regulations,* 4 Loyola U. L. Rev. (L. A.) 182 (1971).

[11] Rosado v. Wyman, 397 U.S. 397, 408 (1970); King v. Smith, 392 U.S. 309, 318 (1968); *see also,* 10 J. Family L. 158 (1970).

[12] As of July, 1971, H.E.W. figures showed that 14 states were paying the full "standard of need" to AFDC recipients. Villa v. Hall, 98 Cal. Rptr. 460, 462 n.6 490 P.2d 1148, 1150 n.6 (1971).

[13] Texas has a constitutional limitation on welfare appropriations. The ceiling is $80,000,000, and the legislature cannot exceed this budget without a constitutional amendment. Jefferson v. Hackney, 40 U.S.L.W. 4585 (U.S. May 30, 1972).

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[14] Example: *Percentage Reduction System:* "Assuming two identical families, each with a standard of need of $200, and outside, nonexempt income of $100, the two systems would produce these results:

Texas System		*Alternative System*	
$ 200	(need)	$ 200	(need)
.75	(% reduction factor)	—100	(outside income)
$ 150	(reduced need)	$ 100	(unmet need)
—100	(outside income)	.75	(% reduction factor)
$ 50	(benefits payable)	$ 75	(benefits payable)

Jefferson v. Hackney, 40 U.S.L.W. 4585, 4586 n.6 (U.S. May 30, 1972). "Nineteen of the 26 states that use a percentage reduction system follow the Texas procedure...." *Id.* at n.4.

[15] *Texas* percentage reduction factors are: OAA—100%; AB—95%; APTD—95%; AFDC—75%. Jefferson v. Hackney, 40 U.S.L.W. 4585 n.3 (U.S. May 30, 1972). Mississippi establishes a statutory maximum grant which decreases for each succeeding child: $30 per month for the first child; $18 per month for the second; $12 per month for each additional child. MISS. CODE ANN. § 7173 (Supp. 1971). In Mississippi, AFDC children are allowed to receive 30% of their determined need while the aged receive 100%. Ward v. Winstead, 314 F. Supp. 1225, 1228 (N.D. Miss. 1970).

[16] *E.g.,* Dandridge v. Williams, 397 U.S. 471 (1970) (upheld Maryland maximum grant regulation); Ward v. Winstead, 314 F. Supp. 1225 (N.D. Miss. 1970) (upheld Mississippi maximum grant system); Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969), *vacated,* 397 U.S. 663 (1970), *rehearing denied,* 398 U.S. 945 (1970) (upheld Louisiana percentage reduction system); *but see,* Villa v. Hall, 98 Cal. Rptr. 460, 490 P.2d 1148 (1971) (California Supreme Court invalidated a California system similar to the Texas plan).

[17] Social Security Act § 402(a) (23), 49 Stat. 620 (1935), *as amended* 42 U.S.C. § 602(a) (23) (1970).

[18] *Id.;* Rosado v. Wyman, 397 U.S. 397, 412 (1970).

[19] In response to the 1968 Social Security amendments, Texas increased its AFDC standard of need 11%; subsequently, Texas abolished dollar maximum grants and reduced payments to 50% of the "standard of need." Jefferson v. Hackney, 304 F. Supp. 1332, 1343 (N.D. Tex. 1969).

[20] 392 U.S. 309, 318-19 (1968); *noted in* 22 VAND. L. REV. 219 (1968), *and* 82 HARV. L. REV. 291 (1968).

the United States Supreme Court re-affirmed the right of each state to determine its own level of benefits. In *Dandridge v. Williams*[21] and *Rosado v. Wyman,*[22] the Court recognized and condoned the use of the maximum grant plan. In *Rosado,* the Court expressly rejected the argument that the Social Security amendments deprived the states of their traditional discretion to set the level of benefits.[23] Yet, in spite of the latitude given the states, challenges to the administration of AFDC programs have been sustained by the Court.[24] Where there is a constitutional challenge under the equal protection clause, the Court may invalidate a state regulation where it is without any "reasonable basis,"[25] or where a classification is based on "suspect criteria,"[26] or where the regulation affects "fundamental rights"[27] and there is no "compelling state interest" to justify the regulation. However, in limiting the application of the equal protection clause, the Court has stated that in the area of economics and social welfare a state does not violate the equal protection clause because a classification is imperfect.[28] Some welfare distribution plans may be considered "imperfect," but the legislature may take ". . . one step at a time" as long as its judgements are rational.[29] The question remains as to how far the states are required to go in treating recipients of welfare "equally" under the respective assistance programs.[30]

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[21] 397 U.S. 471 (1970) (upheld Maryland's maximum grant regulation); *see also* 23 VAND. L. REV. 1390 (1970), and 84 HARV. L. REV. 60 (1970), and Note, *Redefining Federal Largess Through State Maximum Grant Regulations, supra* note 10.

[22] 397 U.S. 397, 413 (1970) (although the Court struck down the New York system because it reduced the "standard of need," a percentage reduction system was endorsed as a means to expose the level of "unmet need.")

[23] 397 U.S. 397, 414-15 & n.17 (1970).

[24] *E.g.,* Townsend v. Swank, 404 U.S. 282 (1971) (struck down a regulation prohibiting college students from receiving AFDC benefits); Engleman v. Amos, 404 U.S. 23 (1971) (struck down a New Jersey plan that established income ceilings for AFDC recipients); Shapiro v. Thompson, 394 U.S. 618 (1969) (struck down a one year residence requirement for AFDC eligibility on equal protection grounds); King v. Smith, 392 U.S. 309 (1968) (struck down Alabama "substitute father" regulation).

[25] *E.g.,* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (the traditional equal protection test).

[26] *E.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (invalidated state statute denying welfare benefits to resident aliens); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (classification based on race); Korematsu v. United States, 323 U.S. 214 (1944) (classification based on race).

[27] *E.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation).

[28] Dandridge v. Williams, 397 U.S. 471, 485 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[29] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

[30] The Court has not declared that there is a constitutional right to welfare. *See,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); *see also,* 84 HARV. L. REV. 60, 68 & n. 50 (1970).

In the instant case, the Court declined to expand its interpretation of the Social Security amendments. Relying upon its decision in *Rosado,*[31] the Court held that the Social Security Act, as amended, did not compel the states to raise the level of benefits paid to recipients under state welfare programs.[32] Since the programs were originally intended to be administered by the states, the states retained the right to determine the level of benefits to be provided to recipients in the absence of any expressly specific congressional mandate to the contrary. The Court rejected petitioners' claim that the states were required to adopt an "alternative plan" that would provide greater work incentives and increased benefits to AFDC recipients with outside income. Concluding that the Social Security Act by implication did not enact "a generalized federal criterion to which the states must adhere in their computation of standards of need, income, and benefits," the Court found that the state of Texas had compiled with the requirements of the Social Security Act. Considering petitioners' equal protection challenge, the Court acknowledged the fact that many recipients of AFDC assistance were members of minority groups, i.e., Negroes and Mexican-Americans. However, Congress, not the states, established the basic outlines of eligibility for the various categorical grants. The Court found no racial motivation on the part of the state to render "suspect" the classification of AFDC recipients. Moreover, the Court found that there had been no reduction in the total amount of money appropriated to AFDC by the Texas State Legislature. The majority held that it was not irrational for the state to pay higher benefits to the sick and elderly and therefore concluded that ". . . Texas' decision to provide somewhat lower welfare benefits to AFDC recipients [was not] invidious or irrational."[33] Re-emphasizing the position in *Dandridge,*[34] the majority stated that the Court should refrain from passing value judgments on the merits of the various welfare systems;

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.[35]

Thus, the Court held that, as the states were not required to raise the level of benefits nor provide equal benefits to all recipients of aid under the "categorical assistance" programs, the state of Texas was permitted to apply a lower percentage reduction factor to AFDC recipients.[36]

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[31] 397 U.S. 397, 414 (1970).

[32] Jefferson v. Hackney, 40 U.S.L.W. 4585, 4588 (U.S. May 30, 1972).

[33] *Id.* at 4589.

[34] 397 U.S. 471, 487 (1970).

[35] Jefferson v. Hackney, 40 U.S.L.W. 4585, 4588 (U.S. May 30, 1972).

[36] Justice Douglas, dissenting, argued that lower payments to AFDC recipients should be viewed ". . . against a background of rank discrimination," as 87% were Negro or Mexican-American. He charged that Texas obscured the standard of need

The significance of the Court's decision can best be viewed from the standpoint of what the Court did not do as compared to what it might have done. The Court's decision suggests a reluctance to impose federal requirements upon the states where traditional policy has permitted state control. Other recent decisions of the Court, including *Dandridge* and *Rosado,* are in accord with this policy of restraint in the area of economics and social welfare.[37] Together, these decisions are indicative of a movement by the Court toward a narrower conception of its judicial role, leaving complex social and economic problems to legislative and administrative bodies. The majority prefers to limit the extension of federal power by "implication" by refusing to find a "preferred method" of allocating benefits "implied" in the Social Security Act.[38] Any law, regulation, or classification must necessarily discriminate against someone or some group. Thus, a major question for the Court is presented: to what extent is the equal protection clause applicable to economic inequities? In Texas, eighty-seven percent of the AFDC recipients were Negro or Mexican-American,[39] yet the majority found no "invidious discrimination" because there was no proven "racial motive" in the classification of AFDC recipients. The discrimination was de facto rather than de jure; and the Court declined to hold this de facto discrimination a violation of the equal protection clause. This move suggests a departure from the open-ended application of the equal protection clause under the Warren Court, where in several cases[40] the Court went beyond the limits of intentional discrimination against racial minorities by extending the substantive aspects of equal protection to the indigent in the context of de facto discrimination.[41]

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by "manipulating a mathematical formula;" and, that the Texas computation method denied some AFDC recipients cash benefits and other non-cash benefits. He argued that Congress did not contemplate a reduction of benefits to AFDC recipients, and that, therefore, Texas violated the congressional intent of the Social Security amendments. *Id.* at 4590-92.

Justice Marshall, dissenting, claimed that the Texas system of allocating benefits violated the Social Security Act by ". . . deterring the needy from working, by depriving the needy of social services, and by excluding some needy from any AFDC aid whatsoever." He argued that social welfare legislation requires "equal treatment for all" under the various categorical assistance programs. *Id.* at 4592-97.

[37] *E.g.,* James v. Valtierra, 402 U.S. 137, 142 (1971) (held there was no denial of equal protection in a defeated referendum for low cost housing); Labine v. Vincent, 401 U.S. 532 (1971) (5-4 decision upholding state law that denied illegitimate children equal inheritance rights with legitimates).

[38] Jefferson v. Hackney, 40 U.S.L.W. 4585, 4587 (U.S. May 30, 1972).

[39] *Id.* at 4589 & n.17.

[40] *E.g.,* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (state poll tax violated the equal protection clause as discrimination against the poor); Douglas v. California, 372 U.S. 353 (1963) (imposed affirmative duty on the state to provide appellate counsel to indigents); Griffin v. Illinois, 351 U.S. 12 (1956) (struck down de facto barriers to indigents in the criminal process, *i.e.* imposed affirmative duty to provide trial transcripts to indigents).

[41] Sager, *"Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,"* 21 STAN. L. REV. 767, 779 (1969).

In refraining from weighing the merits of alternative welfare distribution plans, the Court takes a progressive step in recognizing practical realities. The philosophical position of the Court was re-emphasized in a quotation from *Dandridge*:

> We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.[42]

Unless the Court is to assume a legislative posture and impose its judgment on state policy matters it is wise to abstain.[43] This position of the Court is especially appropriate because there are legislatve measures pending before Congress that would significantly change the present welfare system.[44]

William Dean Stark

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[42] Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[43] *But see* 84 HARV. L. REV. 60, 71 (1970) (the writer suggests that although the Court ". . . applauds the War on Poverty, it has conscientious scruples against fighting in it." *Id.* at 71.

[44] *See Welfare, Time for Reform,* SATURDAY REVIEW, May 23, 1970 at 19; H.R. 1, 92d Cong., 1st Sess. (1971); S. 2037, 92d Cong., 1st Sess. (1971); If either the "Negative Income Tax" or President Nixon's "Family Assistance Plan" were adopted, the federal government would guarantee present AFDC recipients a subsistance schedule of payments; the state could elect (or may be compelled) to increase this schedule by adding state funds: *cf. Hearings on H.R. 16311 Before the Senate Committee on Finance,* 91st Cong., 2d Sess., pt. 1 (1970). Secretary Finch stated that: "The Family Assistance Plan would replace the present AFDC program and would provide direct federal payments to all needy families with children." *Id.* at 180.

TORTS—WILLINGNESS TO ABROGATE THE LOCALITY RULE IN MEDICAL MALPRACTICE SUITS INDICATED

The plaintiff sued two Jackson, Mississippi, physicians for injuries she received as a result of an operation they performed on her.[1] A physician from New Orleans, Louisiana, was called as a medical expert by the plaintiff. The lower court, invoking the locality rule, refused to allow the physician to testify on the grounds that "he had no knowledge of the standard of skill and care exercised by physicians in the Jackson area."[2] The plaintiff dismissed the witness without making an offer of proof and closed her case without offering further expert medical testimony. At the close of all the proof the defendants were granted a directed verdict. On appeal to the Mississippi Supreme Court, *held,* affirmed. Unless the nature of the case is such that it is within the common knowledge of laymen, negligence cannot be shown in a medical malpractice case without expert medical testimony that the defendant failed in some way to exercise ordinary care and skill. Although the validity of the locality rule was not decided due to the fact that plaintiff made no offer of proof of the excluded testimony of her medical expert, the court stated that they were "not convinced that the 'locality rule' should be entirely abolished."[3] *Dazet v. Bass,* 254 So. 2d 183 (Miss. 1971).

The locality rule in medical malpractice cases operates to limit the duty of a physician to his patient to that degree of care and skill ordinarily exercised by physicians in good standing, similarly situated in the same locality as the defendant physician.[4] Since the defendant physician is judged by local standards, the plaintiff patient bears the burden of proving a breach of duty by an expert medical witness who is familiar with the standard of care ordinarily exercised in the defendant physician's locality of practice.[5]

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[1] The defendants, both specialists in the field of obstetrics and gynecology, operated on the plaintiff for removal of a growth in her left ovary. Following the operation the plaintiff experienced a gushing of urine from her vagina. After a period of unsuccessful treatment it was discovered that the flow of urine was caused by a small hole in the common wall between the vagina and bladder, and the plaintiff underwent corrective surgery to remove the problem. Dazet v. Bass, 254 So. 2d 183, 184-86 (Miss. 1971).

[2] *Id.* at 187.

[3] *Id.*

[4] *See* 61 AM. JUR. 2d *Physicians and Surgeons* §§ 110, 116, 202, 207 (1972).

[5] This aspect of the locality rule has received widespread attention in recent years due to the so-called "conspiracy of silence" among members of the medical profession. Most writers agree that the locality rule combined with the reluctance or refusal of the medical profession to testify against a fellow member has created a situation in which many justified claims go unredressed simply for the unavailability of expert witnesses. *See, e.g.,* Kelner, *The Silent Doctors — The Conspiracy of Silence,* 5 U. RICH. L. REV. 119 (1970); Markus, *Conspiracy of Silence,* 14 CLEV.-MAR. L. REV. 520 (1965). Some courts, in overruling the locality rule have made mention of the "conspiracy of silence;" *e.g.,* Pederson v. Dumochel, 72 Wash. 2d 73, 431 P.2d 973, 977 (1967).

The locality rule was first announced in 1870 in the Kansas case of *Tefft v. Wilcox*.[6] The court in *Tefft* reasoned that a physician in a rural area should not be held to the same standard of care and skill as a physician in a larger metropolitan area where there is a greater opportunity for a physician to perform and observe surgical procedures and treat more types of diseases.[7] Since the *Tefft* decision virtually every American jurisdiction has applied the locality rule in some form.[8]

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[6] 6 Kan. 46 (1870).

[7] *Id.* at 63-4; *accord,* Small v. Howard, 128 Mass. 131 (1880).

[8] There are basically three variations of the locality rule:

(1) *The strict locality rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in the community in which he practices. For example, a Jackson, Mississippi, physician would be judged by the standard of care and skill ordinarily exercised within Jackson. *See, e.g.,* Almi v. Updegraff, 8 Ariz. App. 494, 447 P.2d 586 (1969); Govin v. Hunter, 374 P.2d 421 (Wyo. 1962). Under this rule the plaintiff's expert medical witness must be familiar with the standard of care and skill exercised in the defendant's community, i.e., Jackson, Mississippi. *See* Lockart v. MacLean, 77 Nev. 210, 361 P.2d 670 (1961).

(2) *The same or similar locality rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in his or a similar community; *e.g.,* Walls v. Boyett, 216 Ark. 541, 226 S.W.2d 552 (1950); Meyer v. Moell, 186 Neb. 397, 183 N.W.2d 480 (1971); Richardson v. Doe, 176 Ohio St. 370, 199 N.E.2d 878 (1964); Donaldson v. Maffucci, 397 Pa. 584, 156 A.2d 835 (1959). Most courts define "similar" in socioeconomic terms; *e.g.,* Michael v. Roberts, 91 N.H. 499, 23 A.2d 361 (1941); Morrill v. Kamosinski, 256 Wis. 417, 41 N.W.2d 620 (1950). Other courts disregard socioeconomic factors where medical factors are similar; *e.g.,* Horton v. Vickers, 142 Conn. 105, 111 A.2d 675 (1955); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931). The plaintiff's medical expert will be held competent to testify as to the standard of care so long as the community in which he practices is deemed the "same or similar" to that in which the defendant physician practices.

(3) *The same neighborhood rule* — This rule limits the duty of a physician to that degree of care and skill ordinarily exercised in the same general neighborhood in which he practices; *e.g.,* Foose v. Haymond, 310 P.2d 722 (Colo. 1957); Levett v. Etkind, 158 Conn. 567, 265 A.2d 70 (1969); Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964); O'Neil v. State, 66 Misc. 2d 396, 323 N.Y.S.2d 56 (1971); Pepin v. Averill, 113 Vt. 212, 32 A.2d 665 (1943). This is a liberalization of the strict locality rule. There are no judicial definitions as to what comprises the "general neighborhood" in geographic terms and most courts beg the question in this regard. The plaintiff's medical expert will be held competent to testify so long as he practices in the same "neighborhood" as the defendant physician or is familiar with the standard of care exercised in that "neighborhood". For example, in a malpractice action against a Jackson, Mississippi physician, a medical expert practicing in Brandon, Raymond, Canton, or Clinton, Mississippi, *may* be competent to testify.

It should be noted that a medical expert need not be familiar with the practice in a particular locality if his testimony does not relate to the standard of care. *See, e.g.,* Montgomery v. Starey, 84 So. 2d 34 (Fla. 1955); Meiselman v. Crown Heights Hosp., Inc., 285 N.Y. 389, 34 N.E.2d 367 (1941).

Changes in population distribution, improved medical education and facilities, standardization of medical practice, and increased medical specialization have led some courts to abandon the locality rule, especially as it relates to the competency of a medical expert and the standard of care required of anyone who holds himself out as a medical specialist.[9] Most of these courts have adopted a rule by which the standard of care and skill required of a physician is that of the average practitioner under the same or similar circumstances with his locality of practice as merely a factor to be considered in determining whether or not he exercised proper care and skill under the circumstances.[10]

Other courts, reluctant to entirely abandon the locality rule, have limited its effect by recognizing that certain types of medical procedures have become so standardized that geographic locality should not cause a marked differentiation in the standard of care required of the physician. This rationale has been applied to the treatment of fractures,[11] x-ray treatment,[12] and surgery for removal of a cataract.[13] There are, no doubt, many other medical procedures to which this doctrine could be applied.[14]

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[9] Geraty v. Kaufman, 115 Conn. 536, 162 A. 33 (1932) (due to evidence of standardized practice in treating fractures, non-local medical expert held competent to testify in malpractice action arising out of alleged negligent treatment of a fracture); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950) (strict locality rule abandoned in favor of a "reasonable physician" rule with locality as merely a circumstance to be considered); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968) (strict locality rule abandoned in favor of a "reasonable physician" rule with availability of medical facilities in the locality being a factor to be considered in determining the standard of care required); Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) (locality rule as applied to medical specialists abandoned in favor of a "reasonable medical specialist" rule without consideration being given to locality); Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970) (locality rule as applied to medical specialists abandoned); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953) (locality rule abandoned as applied to the competency of medical experts); Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970) (locality rule abandoned); McElroy v. Frost, 268 P.2d 273 (Okla. 1954) (due to evidence of standardized procedures of x-ray treatment, non-local medical expert held competent to testify in malpractice action arising out of alleged negligent administration of x-ray treatments); Christian v. Jeter, 445 S.W.2d 51 (Tex. Civ. App. 1969) (locality rule as applied to the competency of medical experts abandoned); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967) (locality rule abandoned in favor of a "reasonable physician" standard with locality as one circumstance to be considered in determining the standard of care required); Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967) (strict locality rule modified so as to limit its application to those instances in which treatment is not of a standardized nature).

Some courts which have abandoned the locality rule as applied to medical specialists continue to apply it in cases involving general practitioners. *Compare* Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) *with* Abbe v. Woman's Hosp. Ass'n, 35 Mich. App. 429, 192 N.W.2d 691 (1971).

[10] *E.g.,* McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).

[11] Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932).

In the instant case the court conceded that there was considerable force in the argument that the locality rule is no longer valid, particularly as applied to medical specialists, but nevertheless expressed reluctance at the idea of entirely abolishing the rule.[15] Since it was not necessary to decide the question in the instant case,[16] the court did not express an opinion as to whether the locality rule presently applied in Mississippi or whether it should be modified, and if so, to what extent.[17]

A 1968 study[18] by the Mississippi Medical Association revealed some relevant facts about postgraduate medical education in Mississippi and the percentage of Mississippi specialists who are certified by their respective American boards.[19] Of the non-surgical disciplines the study revealed the following breakdown of American board certification:

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[12] McElroy v. Frost, 268 P.2d 273 (Okla. 1954).

[13] Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967).

[14] In Morris, *Response to Ribicoff: Malpractice Suits vs. Patient Care,* 37 INS. COUNS. J. 206, 218 (1970), the author lists the following ranking of reasons for bringing malpractice suits:

1. Foreign body left in patient during surgery
2. Untoward results of tight casts
3. Technical surgical errors
4. Lack of informed consent
5. Errors of a resident, intern or nurse
6. Adverse reactions to penicillin or tetanus shots
7. Abandonment of obstetrical patient
8. Burns due to x-ray, diathermy, or chemicals
9. Neglecting to properly attend a surgical cardiac arrest

See also B. FICARRA, SURGICAL AND ALLIED MALPRACTICE (1968) where the author describes case histories of malpractice injuries to various parts of the body.

[15] 254 So. 2d at 187.

[16] *See* text *supra.*

[17] The "same neighborhood" rule of Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964) is stated as follows:

> [A] physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. *Id.* at 196, 164 So. 2d at 766, quoting 41 AM. JUR. *Physicians and Surgeons* § 82 (1942).

[18] MISSISSIPPI MEDICAL ASS'N, PROFILE OF ATTAINMENT — MEASURE OF NEED: A STUDY OF POSTGRADUATE MEDICAL EDUCATION IN MISSISSIPPI (1968) [hereinafter cited as PROFILE].

[19] American board certification may be obtained by specialists in their respective disciplines only after they have met certain minimum *national* standards.

Specialty	*Percentage certified*
Pediatrics	59%
Dermatology	50%
Pathology	78%
Cardiology	50%
Radiology	67%
Internal Medicine	34%[20]

Of the surgical disciplines the study showed the following breakdown of American board certification:

Specialty	*Percentage certified*
Orthopaedic Surgery	45%
Urology	38%
Obstetrics/Gynecology	36%
Opthalmology	63%
General Surgery	44%
Plastic Surgery	50%
Neurological Surgery	67%[21]

Thus it appears from this 1968 study that of all medical specialties[22] in Mississippi more than fifty percent of the practitioners have been certified by their respective American boards as having met minimum *national* standards.[23]

Despite the encouraging showing from the viewpoint of American board certification, the study revealed that Mississippi ranks behind her neighboring states and states with comparable populations in the availability of institutions within the state having formal medical postgraduate study opportunities.[24] Mississippi has only one such institution whereas Alabama has three, Arkansas two, Louisiana fifteen, and Tennessee four.[25] Although Mississippi ranks behind adjacent and comparable states in that respect, there was no showing in the study that there should be a marked differentiation *within* the state, particularly among specialty practitioners, of the standard of care and skill exercised under the circumstances of each case.

The Mississippi Supreme Court's statement in *Dazet* that the locality rule should not be entirely abolished raises hope among the plaintiff's bar that when given the opportunity the court will liberalize the present narrow rule in favor of a rule broadening the area from within which expert medical witnesses may be obtained. Drawing from the decisions of other jurisdictions a rule could be formulated which would alleviate the problem caused by the "conspiracy of silence" yet take into account any factors peculiar to the locality within which the defendant physician practices.

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[20] PROFILE, *supra* note 18, at 35.

[21] *Id.* at 36.

[22] At the present time general practitioners are not board certified.

[23] Unless the particular American board requires re-examination for continuation of certification, changes in the state of medical knowledge could cause a slight differentiation in the skill exercised among members of a particular specialty. This fact alone, however, should not give validity to the locality rule since date of certification not geographic locality is the cause of the differentiation.

[24] PROFILE, *supra* note 18, at 98.

[25] *Id.* at 105. The study did not show the number of Mississippi practitioners who attended refresher courses at institutions outside the state.

The 1968 study by the Mississippi Medical Association demonstrates that in attempting to formulate any new rule a difference should be recognized between specialists and general practitioners.[26] This approach was recently recognized by the Supreme Court of Michigan.[27] Since more than fifty percent of Mississippi specialists have met minimum *national* standards it would seem to be a stretch of the imagination to assume that a different standard of care and skill should be applied to them merely because they chose to practice in Mississippi. Medical factors[28] peculiar to the locality in which the defendant practices should be considered as one element in determining the standard of care required and the competency of medical experts.[29] The burden should be on the defendant to come forward with proof of local factors which would warrant a deviation from the national norm.[30] Otherwise, the standard which should govern the specialist is that degree of care and skill exercised by the ordinary specialist, in the same line of practice, under the same or similar circumstances.[31]

The locality rule still has some validity as applied to the general practitioner, particularly to that vanishing species known as the country doctor. Unlike the specialist who imposes a limitation upon the amount of medical knowledge he must digest in order to keep abreast, the general practitioner must attempt to keep current in all areas of medical practice. Likewise there are no minimum national standards for the general practitioner. It is conceivable that a general practitioner in a rural area would be less knowledgeable than his metropolitan brother who discusses medical problems with the specialists who practice in the same clinic. On the other hand, the present Mississippi rule[32] is too narrow, even for the country doctor. With the tremendous strides made in formal medical education, and given similarity of medical factors,[33] it is not likely that standards exercised by the general practitioner will vary from locality to locality.[34] Thus, the standard required of a general practitioner should be that standard of care and skill exercised by the average general practitioner in the same or a medically similar locality under the same or similar circumstances.[35] In those cases where it appears that the treatment involved is a standardized procedure which should be unaffected by locality, the application of the same or medically similar locality rule should be suspended.[36]

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[26] *See* PROFILE, *supra* note 18.

[27] In Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970) the court contrasted the general practitioner and the specialist thusly:

> Whatever the considerations were that allowed the area practice to set the standard for the country general practitioners — they are not relevant to a metropolitan specialist — calling a specialist parochial or bucolic is hardly appropriate.
>
> The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may keep abreast. 180 N.W.2d at 791.

[28] This would include the availability of postgraduate medical education, availability of medical facilities and equipment, etc.

[29] *E.g.,* Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793, 798 (1968).

[30] This shifting of the burden of proof was suggested in Note, *Medical Specialties and the Locality Rule,* 14 STAN. L. REV. 884, 892-93 (1962).

[31] *E.g.,* Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970).

When the validity of the locality rule is again questioned before the Mississippi Supreme Court, the court should join the increasing number of jurisdictions[37] which have acknowledged "that the legal rule ceases when the reasons for it ceases."[38]

Franklin C. McKenzie, Jr.

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[32] Delaughter v. Womack, 250 Miss. 190, 164 So. 2d 762 (1964).

[33] *See* note 28 *supra.*

[34] *See* D. Louisell & H. Williams, Medical Malpractice ¶ 8.06 at 211 where the authors state:

> Today the question of variation in medical standards according to area seldom arises except in the context of urban as contrasted with rural standards. Even that contrast is of diminishing significance.... *Id.*

[35] *E.g.,* Williams v. Chamberlain, 316 S.W.2d 505 (Mo. 1958); Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956).

[36] *E.g.,* Geraty v. Kaufman, 115 Conn. 563, 162 A. 33 (1932).

[37] Cases cited *supra* note 10.

[38] D. Louisell & H. Williams, *supra* note 34, at 212.

BOOK REVIEWS

COME DRILL A WELL IN MY BACK YARD

Vincent Scoper, Jr. Copies may be obtained by writing the author at P.O. Box 2366, Laurel, Mississippi 39440. 1971 $2.95. Pages 96.

This book combines the desirable quality of readibility with invaluable basic information about the oil industry. The author, a geologist who has had extensive experience in both onshore and offshore oil and gas exploration, has also worked with landowners, drillers, lawyers, petroleum engineers, and investors. From these relationships he has gained a broad view of the industry which he presents in a plain, easily understood style of language, often enriched with touches of humor. As the author states, this is not intended to be a technical book. It is intended to answer questions which he has received in the course of his dealings with landowners and investors who were curious about the general nature of the oil business and how money is made in oil.

Several groups of people should find this little book useful: landowners who wish to lease their land, have it already under lease, or even have producing wells on it; would-be investors; attorneys who may be familiar with the technicalities of drafting legal papers such as leases and mineral deeds but who also can benefit from some basic knowledge of the geological and producing aspects of this exciting industry. The book should also be a must for law students in an oil and gas course, since it provides a quick background of geological and production information which should aid in understanding the cases and, in general, add color and interest to the course.

Especially helpful are the many excellent drawings and diagrams illustrating graphically how oil was formed, the types of formations in which it is usually found, what a drilling unit looks like, the mechanism of a drilling rig and how drilling mud is utilized, the process of "fishing" to remove a stuck pipe from a well, the procedure when a well "blows out" and a relief well has to be drilled, the final procedures in bringing in a well, the techniques used in secondary recovery or waterflooding a field, how salt domes are formed and why they are important in the oil industry.

The book dispels some popular misconceptions concerning the oil business. For example, the author states that "many people think that oil is found in huge cave-like cavities beneath the surface" and assume that "you just drill a hole and suck it out like a straw in a soda;" or that "oil is found in rivers under the ground." He then describes where oil is actually found and why it is there in the first place. The title of the book itself reflects a popular idea that anyone can drill a well in his back yard, although, as the author points out, in reality an individual is bound by conservation regulations in the same manner as an oil company, and a person's back yard would have to contain at least 40 acres.

One chapter describes the techniques employed by oil companies in searching and testing for oil; another answers the question frequently asked by landowners, Why does my neighbor get part of the oil if the well is drilled on my land? The author explains what a "wildcat well" is and describes in detail the methods of drilling a well, including an explanation of "drilling mud" and the reasons for its use. The chapter on offshore drilling includes an interesting drawing of an offshore drilling platform showing seven wells being drilled from the same platform by means of a "whipstock" device.

The latter part of the book deals briefly with selling and buying leases, minerals, and royalty, as well as investing in a drilling venture. Of interest to landowners will be the section explaining what he can expect when he leases his land, particularly the implications of certain lease terms such as pooling, bonus, rental payments and royalty. There is a brief discussion of the types of investments which are available in the oil business, such as the purchase of mineral rights or royalty, and the advantages and disadvantages of buying an oil and gas lease or investing in a working interest.

While this book does not purport to be an in-depth analysis of the many phases of the oil industry, it fulfills it purpose by sketching a broad picture which should excite the interest of many persons to take a closer look, and is well worth the very short time required to read it.

Jean R. Richey

CIVIL LIABILITY UNDER THE MISSISSIPPI SECURITIES ACT

*E. Clifton Hodge, Jr.**

I. INTRODUCTION

The regulation of the issuance and exchange of securities in the United States was initiated at the state level.[1] Kansas passed the first general securities law in 1911,[2] and it was in Kansas that the term "Blue Sky Law" was first used to describe legislation aimed at promoters who "would sell building lots in the blue sky in fee simple."[3] When the first federal securities legislation was enacted in 1933, forty-seven states and Hawaii had enacted Blue Sky Laws.[4] The subsequent development of federal securities regulation is well documented and such regulation will be discussed only to the extent that it contributes to an understanding of the main topic herein. Similarly, the various state Blue Sky Laws, except for the effect of the Uniform Securities Act,[5] are so diverse that they can be used meaningfully only in a comparison of specific provisions. Generalizations, summaries, and statistical facts about state Blue Sky Laws are beyond the scope of this article.[6]

This article is concerned primarily with the Mississippi Blue Sky Law, which is officially referenced as the "Mississippi Securities Act."[7] As the title of this article indicates, attention will be focused on the civil liability which exists under this statute. The reason for the concentration on civil liability is twofold. First, a more general discussion within the confines of this article would be useless. Secondly, in a state such as Mississippi where funds available for the administrative regulation of securities are definitely limited, civil liability may be the only effective means of enforcement.[8] To understand civil liability under an act, one must first understand the general provisions of the entire act. Therefore, in order to place the civil liability provisions in proper focus, all aspects of the Mississippi Securities Act (hereafter alternatively referenced as Mississippi Act or Mississippi Blue Sky Law) will be presented in summary fashion. After the description of the substantive scheme of the Mississippi Act, there will be presented a detailed analysis of civil liability under the Mississippi Act, with occasional reference to the Uniform Securities Act and other state Blue Sky Laws, with the ultimate goal being suggestions as to how civil liability can be most effectively used for securities regulation in Mississippi. Because this article is confined to a narrow topic on which there is very little authority, the verbose footnotes which are traditional in law review articles will be noticeably absent.

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[1] 1 L. Loss, SECURITIES REGULATIONS 23 (1961). *See generally* 1 L. Loss, *supra*, at 3-128 for a history of the securities regulation prior to the Federal Security Act of 1933.

[2] *Id.* at 25.

[3] *Id.* at 27, *quoting* Mulvey, *Blue Sky Law,* 36 CAN. L.T. 37 (1916).

[4] 1 L. Loss, *supra* note 1, at 30.

[5] L. Loss & E. COWETT, BLUE SKY LAW 245-420 (1958).

[6] For the only significant endeavor at such compilations *see* L. Loss & E. COWETT, *supra* note 5.

[7] MISS. CODE ANN. §§ 5360-5390 (Supp. 1971).

II. THE MISSISSIPPI BLUE SKY LAW

First enacted in 1916,[9] the Mississippi Act has remained relatively unchanged since 1930 when the original act was first amended.[10] Further amendments followed in 1932,[11] 1942,[12] 1958,[13] and 1964.[14] The changes in 1958 merely refined the 1942 statute and the 1964 amendment was insignificant, so that the present statute is substantially the same as the 1942 statute.[15]

In accordance with the general pattern of most state Blue Sky Laws, the Mississippi Act has three types of regulatory provisions: (1) provisions requiring the registration of certain persons in the securities business; (2) provisions requiring the registration of certain securities; and (3) provisions creating liability for failure to comply and for fraudulent activities. In the ensuing discussion an attempt will be made to keep these different areas of regulation in mind.

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[8] "The inadequate budgets and uneven enforcement of the blue sky laws make civil liability the only effective sanction in many states—perhaps most states." 3 L. LOSS, *supra* note 1, at 1631.

[9] Act of April 3, 1916, ch. 97 [1916] GEN. LAWS MISS.

[10] MISS. CODE ANN., ch. 100, art. 2 (1930).

[11] Act of May 18, 1932, ch. 88 [1932] GEN. LAWS MISS.

[12] Act of March 19, 1942, ch. 297 [1942] GEN. LAWS MISS.

[13] Act of May 8, 1958, ch. 202 [1958] GEN. LAWS MISS.

[14] MISS. CODE ANN. §§ 5360-5390 (Supp. 1971).

[15] For a discussion of the history of the Mississippi Blue Sky Law, *see* Stevens & Little, *Offer and Sale of Corporate Securities* in PROCEEDINGS OF THE TWENTIETH ANNUAL MISSISSIPPI LAW INSTITUTE ON CORPORATE PRACTICE 66-70 (1965).

A. Which Persons Must Register?

Generally, there are two categories of persons who must register under the Mississippi Act: (1) the company which actually issues the security, which may or may not be involved in selling the security; and (2) the salesman of the security who may or may not be associated with the issuing of the security. Broadly speaking, the former is referred to as an "investment company," and the latter is referred to as a "dealer" or "agent."

Section 5362 of the Mississippi Act provides that any "investment company" must register with the secretary of state before selling or offering for sale any security in the state of Mississippi. Section 5361 (a) defines a domestic investment company as "[e]very person, corporation, copartnership, limited partnership, company or association" organized in the state of Mississippi which sells or offers for sale any security within Mississippi.[16] Section 5361 (b) defines a foreign investment company as being "[e]very such person, corporation, copartnership, limited partnership, or association" which is a resident of or organized in any state or territory other than Mississippi. There is no apparent reason for limiting domestic investment companies to those selling or offering to sell stock, while not so limiting the definition of foreign investment companies. Technically, under sections 5361 (b) and 5361 (g) every individual who is a resident of a state other than Mississippi is a "foreign investment company." Section 5361 (c) defines a security as being:

> [A]ny stocks, treasury stock, bond, debenture, transferable certificate of interest or participation, certificate of interest in an oil, gas, or mining title or lease, trust certificate, monthly installment savings bond or certificate, diversified trustee shares,

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[16] The 1932 Act did not in its definition of "domestic investment company" contain the term "limited partnership." The inclusion of this term in the 1958 Act has allowed Mississippi to avoid the conflict of authority on the applicability of state blue sky laws to the sale of limited partnership interests. *See* Opinion of Attorney General of Georgia, 3 CCH Blue Sky L. Rep. ¶ 70,830 (1969) (Act applicable to investment club formed as a limited partnership); Opinion of the Attorney General of North Dakota, 3 CCH Blue Sky L. Rep. ¶ 70,799 (1969) (Act applicable to sale of limited partnership interests); Opinion of the Attorney General of Minnesota, 3 CCH Blue Sky L. Rep. ¶ 70,713 (1966) (General partner under the Uniform Limited Partnership Act was not an investment advisor under Blue Sky Law); Opinion of Attorney General of Nevada, 3 CCH Blue Sky L. Rep. ¶ 70,691 (1965) (Sale of limited partnership interests to more than 24 persons requires registration under the Blue Sky Law).

> or transferable share, investment contract or beneficial interest, whatsoever in, or title to, property or profits, or any instrument commonly known as a security.[17]

Section 5361 (f) defines "offer for sale" as "every attempt to offer to dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value."

As can be readily ascertained from these sections, the Mississippi Securities Act has a very broad scope. The rule of thumb is thus: *Any person selling or offering to sell anything remotely resembling a security in the state of Mississippi, unless a specific exemption is applicable, must register with the secretary of state.* The word "person" is used in this rule as it is in the Mississippi Act to include "an individual, a corporation, a partnership, limited partnership, an association, a joint stock company, a trust company or any other unincorporated organization."[18]

Section 5372 requires any "dealer" or "agent" desiring to sell or offer for sale any security in the state of Mississippi to obtain a permit from the secretary of state. Section 5361 (d) defines "dealer" as being any person who is wholly or in part in the business of dealing in securities. A "limited dealer" is only authorized to sell a certain issue or class of security.[19] An "agent" is a person appointed by an investment company or dealer to sell securities for compensation.[20]

A detailed explanation of the procedure by which investment companies and dealers register with the secretary of state is beyond the scope of this article. The important determination for the purposes of this article is whether the person should register and not the manner in which such a registration would be accomplished. The above provisions of the Mississippi Act control which persons must register with the secretary of state, and unless the investment company or dealer is involved with a security for which a specific exemption as hereafter described exists, such company or dealer must register.

B. *Which Securities Must Be Registered?*

As noted earlier, there is some overlap in describing *who* must register and which *securities* must be registered. As a general rule it is safe to say that all "securities" (as previously defined) must be registered with the secretary of state before being sold or offered for sale, unless there is specific exemption. Therefore, under this general rule, the exemptions become determinative.

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[17] MISS. CODE ANN. § 5361 (c) (Supp. 1971).

[18] *Id.* § 5361 (g).

[19] *Id.* § 5361 (d).

[20] *Id.* § 5361 (e).

Sections 5384 and 5384.5 describe the securities and transactions which are exempt from the Mississippi Act.[21] Outside of the civil liability provisions, these two sections are probably the most important to a person desiring to sell a security in Mississippi. A general outline of the exempt securities under Section 5384 is as follows:

(1) *Government Securities* — securities issued or guaranteed by the United States, states, or certain other governments.

(2) *Banks and Loan Associations* — securities issued by banks and loans associations which are supervised by the federal or state government. Capital stock of a loan association is not exempted.

(3) *Domestic Insurance Companies* — securities issued by domestic insurance companies which are subject to supervision by an agency of the state of Mississippi.

(4) *Insurance Policies and Contracts* — certain endowment policies and insurance contracts issued by a person subject to federal or state regulation.

(5) *Railroad or Public Utility* — certain securities issued by a railroad or public utility which is regulated by a state or federal agency.

(6) *Non-Profit Organizations* — securities issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, hospital or reformatory purposes and not for pecuniary profit.

(7) *Securities Listed on National Securities Exchanges* — securities listed on the national security exchanges which are registered under the Securities Exchange Act of 1934, and all securities senior or equal in rank to any securities so listed.

(8) *Negotiable Promissory Notes or Commercial Paper.*

(9) *Foreign Governments* — securities issued or guaranteed by certain foreign governments with which the United States maintains diplomatic relations.

(10) *Certain Secured Notes and Bonds*—certain notes and bonds secured by a mortgage or deed of trust if the note or bond and security therefor are sold to a single purchaser or at a single sale.

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[21] In 1964, section 5384 of the 1958 Act was divided into two parts to separate "exempt transactions" from "exempt securities." Evidently, this was the only change made in 1964. *See* Editor's Note, MISS. CODE ANN. § 5384.5 (Supp. 1971).

(11) *Co-operatives* — securities of co-operatives organized under the laws of Mississippi where all stockholders and promoters are residents of Mississippi.

(12) *Oil, Gas, or Mineral Lease* — certain mineral leases where the working interest is not less than 1/642.

The exempt *transactions* under section 5384.5 (as opposed to exempt *securities* under section 5384) are as follows:

(1) *Sale by Executor, Administrator, Guardian, Conservator, Regulated Bank or Trust Company or Trustee or Receiver in Bankruptcy* — the exemption for sales by a bank or trust company is limited to situations where the bank or trust company is trustee under a will or trust agreement.

(2) *Sale of Securities by Pledge* — sale of securities by pledgee if sale is in good faith and not for the purpose of avoiding the Blue Sky Law.

(3) *Isolated Transaction* — sale of securities by the owner thereof, other than an issuer or underwriter, when the sale is an isolated transaction and not made in the course of repeated or successive transactions.

(4) *Stock Dividend* — stock dividends or other distributions out of earned surplus.

(5) *Exchange of Stock for Assets or Merger or Consolidation* — securities issued in exchange for all or substantially all of a corporation's assets, and securities issued in connection with a consolidation or merger.

(6) *Stock Exchange* — securities issued by a corporation solely in exchange with its security holders.

(7) *Sale to a Person a Principal Part of Whose Business Consists of Buying Securities* — includes sales to a bank, savings institution, trust company, insurance company, dealer, an agency or instrumentality of the United States or of a state.

(8) *Stock Conversion* — securities issued pursuant to a right of conversion.

(9) *Less Than Ten Shareholders* — the sale of securities where the number of shareholders after the sale does not exceed ten. This exemption requires that said shareholders shall not acquire these securities for the purpose of transfer or resale to others, and when the amount of the sale exceeds $50,000.00, the shareholders must file a written notice of intent not to transfer the securities.

(10) *Secondary Sales* — sales by a registered dealer of securities previously sold and distributed to the public if information about the issuer appears in a recognized manual of securities at the time of sale.

It can be easily noted that the exemptions in the Mississippi Securities Act encompass most securities transactions. The exemptions have been presented in order to establish the scope of the Mississippi Act before moving into a discussion of civil liability. An analysis of the exemptions brings into focus the type of enterprise with which the Mississippi Act is concerned. It is not a large interstate operation, as such companies are adequately regulated by the federal government. It is not a very small closely held company because such companies do not pose much of a threat to the public. It is not a company which, because of its nature, is already controlled by some agency of the state or federal governments. To put it simply and rather generally, the Mississippi Act is concerned with any enterprise which is not already regulated by an independent body and which solicits investments from the general public in the state of Mississippi.

III. Civil Liability

Basically, there are three sources of civil liability in the sale of securities: (1) common law, (2) state Blue Sky Laws, and (3) federal securities statutes.[22] Although attention will be directed toward civil liability under the Mississippi Act, the other sources of liability will be mentioned when applicable.

Section 5374 (a) of the Mississippi Act provides that it is unlawful to sell or offer for sale any security in the state of Mississippi for which there is no specific exemption unless the secretary of state has issued his certificate for the sale of such security. This section also makes it unlawful for any person to advertise such security in Mississippi. Section 5374 (b) makes the sale of any security made in violation of "any provisions of this act" voidable at the election of the purchaser. In an action under section 5374 (b) the purchaser must tender the security and all income which has been derived from the security. The action must be brought within two years after the purchaser discovered or reasonably should have discovered the violation. The purchaser is entitled to recover the full amount paid for the security, with interest from the date of purchase.[23]

Section 5371 is the other civil liability provision in the Mississippi Act. This section allows a purchaser to recover the amount paid for a security, interest from the date of purchase, and reasonable attorney's fees where the purchaser was induced to buy a security by misrepresentation of a material fact concerning the security. This section permits suit only on the investment company's bond which must be posted with the secretary of state in accordance with Section 5365. Therefore, liability exists under 5371 only when the issuer of the security has complied with the Blue Sky Law and has posted bond.

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[22] 3 L. Loss, *supra* note 1, at 1623.

[23] Miss. Code Ann. § 5374 (b) (Supp. 1971).

Under these two civil liability provisions in the Mississippi Act (sections 5374 (b) and 5371) liability can thus be created either by selling a security in Mississippi in violation of some provision of the Mississippi Act or by selling a security through inducement by misrepresentation of a material fact.

Throughout the remainder of this article reference will be made to sections 5374 (b) and 5371, the two basic civil liabilities sections of the Mississippi Act. To avoid confusion, it is important to elaborate upon the respective roles of these two sections. An action can be had under Section 5371 *only if the seller has complied with the Mississippi Act and has posted a bond pursuant to section 5365.* In such a situation the action is brought upon the bond, and the basis of the action must be that the sale of the security was induced by a misrepresentation of a material fact. Section 5374 (b), on the other hand, is simply a provision for statutory rescission and provides that any sale of a security made in violation of any provision of the Mississippi Act is voidable at the option of the purchaser.

It can be noted, therefore, that if a security is sold in Mississippi and was not registered pursuant to the Mississippi Act, the purchaser would have an action for statutory rescission under section 5374 (b). No action would lie under section 5371 because the security had not been registered and no bond had been posted.

If the security is properly registered and the sale induced by misrepresentation of a material fact, an action would prima facie lie under section 5371 upon the bond posted for the security. An action for statutory rescission would also lie under section 5374 (b) because the sale would have been in violation of section 5380, the general anti-fraud provision of the Mississippi Act.

The interrelation of these two civil liability provisions is unnecessarily confusing. In the following discussion of the Mississippi Act, an attempt will be made to clarify the relevant differences between the two sections.

A. Liability on Surety Bonds

Section 5365 provides that before selling securities in Mississippi an investment company must post a bond in the amount of 5 percent of the total aggregate offering price and that the bond shall not be for an amount less than $500.00 nor more than $50,000.00. Several questions have arisen with regard to this bond which must be posted by investment companies.

A series of cases against the Nu Pine Corporation in the late 1950's is especially illuminating on this subject. An action was brought by one Rice against the trustee in bankruptcy for Nu Pine Corporation and the surety on the bond in the amount of $10,000.00 which the corporation had posted with the secretary of state pursuant to the Mississippi Act. Rice alleged that he had been induced to purchase Nu Pine stock through the use of false and fraudulent statements on the part of the Nu Pine salesman. The chancellor dismissed and held that he did not have jurisdiction because Nu Pine had not been discharged from bankruptcy proceedings in federal court. On appeal the Mississippi Supreme Court reversed, citing the rule that discharge from bankruptcy does not alter the liability of a surety.[24]

In a decision rendered the same day as the above described *United States Fidelity & Guaranty Co. v. Rice* decision, the Court made a similar ruling in *Hederi v. United States Fidelity & Guaranty Co.,*[25] which was another action against Nu Pine's surety. The Mississippi Supreme Court stated:

> The clear purpose, under the statute, for the execution of the $10,000.00 bond was to protect purchasers of stock in the corporation against loss on account of the misrepresentation of any material fact concerning such stock. As expressly provided by the statute, a right of action on the bond arose to them for such damages as they sustained thereby, together with interest and reasonable attorneys' fees.[26]

In the *Rice* and *Hederi* cases, the surety on the bond did not answer the complaint. However, while Rice and Hederi were awaiting the appeal of their cases to the Mississippi Supreme Court, Talmadge H. Heard brought an action before a different chancellor against Nu Pine's surety. This time the surety answered and denied liability. A trial ensued and the complainant won a verdict against the surety in the amount of $10,000.00.[27] After remand by the Mississippi Supreme

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[24] United States Fid. & Guar. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

[25] 237 Miss. 251, 253, 114 So. 2d 615, 616 (1959).

[26] *Id.*

[27] For a description of the *Heard* suit, *see* United States Fid. & Guar. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

Court in the *Rice* and *Hederi* cases as described above, Rice and Hederi put forth the same contentions that they had previously made. This time the surety claimed that it was not liable because the full amount of the bond ($10,000.00) had been paid to Heard. The chancellor held that the surety was estopped to plead payment of the entire penalty and held for Rice in the amount of $1,751.25 and Hederi in the amount of $1,167.50, with additional amount in both instances for attorneys' fees.

The Mississippi Supreme Court affirmed the chancellor's finding that the surety was estopped to claim full payment, notwithstanding a specific provision in the applicable statute that a recovery on a bond could not exceed the penalty thereof, because failure to inform the chancellor in the *Heard* case of the existence of the other two previously filed cases constituted constructive misrepresentation.[28] The court interestingly noted that Heard was listed in the prospectus supplied by Nu Pine as being a director of the company, and the court stated that there was some doubt as to whether a director could sue on the bond.[29]

The Nu Pine litigation is significant because the court allowed recovery for an amount exceeding the amount of the bond posted by Nu Pine. The peculiarity of the three cases involved in this litigation makes it unlikely that the court will find another occasion to go against the express limitation in section 5371 that recovery thereunder cannot be for an amount in excess of the bond posted pursuant to section 5365. Nevertheless, the cases demonstate that the Mississippi Supreme Court can be flexible in its consideration of cases arising under the Mississippi Act.

The case of *New Amsterdam Casualty Company v. Wood*[30] sheds more light on the liability under the Mississippi Blue Sky Law. In this case the surety had assured two bonds. The offering for which the first bond was posted was limited by the secretary of state to preferred stock "and none other"; but the posted bond was not so limited. The court held that the surety was liable for the amount of both bonds for the fraudulent sale of stock covered by the second bond, because the bond had not been limited to preferred stock as had been the secretary's authorization. This case shows that the wording of the coverage of the bond cannot be lightly regarded. It also shows that the bond will be strictly construed in favor of the investing public.

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[28] United States Fid. & Guar. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

[29] *Id.* at 316, 130 So. 2d at 927.

[30] 213 Miss. 499, 57 So. 2d 141 (1952).

In *Irving v. Bankers' Mortgage Co.,*[31] the Mississippi Supreme Court upheld a verdict under the Mississippi Act and held that the surety on the bond need not be joined in an action under this law. The defendant had claimed that there was no action under the Mississippi Act because the surety was not joined and because liability under the conditions of the bond was not evoked. The court rejected this contention stating: "The liability of the surety is measured by that of its principal, and a party having a right of action under these statutes may proceed against the principal without joining the surety."[32]

The secretary of state, with the approval of the attorney general, can cancel any bond filed in accordance with the Mississippi Act after the sale of the securities has been completed. The secretary of state can also release the surety from further liability.[33] As stated previously, the bond is 5 percent of the total aggregate offering price of the securities, but not less than $500.00 nor more than $50,000.00.[34] The bond is conditioned upon the truthfulness of all information submitted to the secretary of state and upon the sale of securities in compliance with all provisions of the Mississippi Act.[35] Recovery upon the bond should not exceed the full amount of the bond, and if a suit is filed against the principal or surety in excess of the amount of the bond, the secretary of state may require a new bond.[36]

The Uniform Securities Act contains a bonding provision which is more flexible than the Mississippi bonding provisions.[37] The Uniform Act leaves the posting of the bond and the conditions thereof at the discretion of the administrator, and the maximum amount of the bond is $10,000.00.[38] On the other hand, the bond is mandatory under the Mississippi Act, the condition is compliance with the statute, and the maximum amount is $50,000.00.[39] The Uniform Act provides that no bond may be required of a registrant whose net capital exceeds $25,000.00. There is no comparable limitation in the Mississippi Act.

The requirements under Mississippi's bonding provisions are very strict. The cases discussed above indicate that the Mississippi courts will not hesitate to be adamant in protecting a defrauded investor who brings an action against the surety on a bond filed pursuant to the Mississippi Act. The strict requirements of the Mississippi Act are well justified and are preferable to the lenient bonding provisions of the Uniform Securities Act. The Mississippi Act must have "teeth" unless it is to become a "paper tiger."

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[31] 169 Miss. 890, 151 So. 740 (1934).

[32] *Id.* at 896, 151 So. at 743.

[33] MISS. CODE ANN. § 5383 (Supp. 1971).

[34] *Id.* § 5365.

[35] *Id.*

[36] *Id.* § 5371.

[37] *See* 3 L. LOSS, *supra* note 1, at 1654-61. The full text of the Uniform Securities Act may be found in 9c UNIFORM LAWS ANN. 68-149 (1957).

[38] 3 L. LOSS, *supra* note 1, at 1654.

[39] *See* text *supra.*

It has been noted that the broad exemptions exclude most securities transactions from the scrutiny of the administrator and civil liability. For those few transactions and companies not exempted, should there be merely a discretionary and limited bonding procedure? It is admitted that uniformity is needed in the *procedure of registering* under the state Blue Sky Laws, but why should there be uniformity in the bonding procedures? A state such as Mississippi with insufficient funds to support an elaborate administrative system for securities regulation should have civil liability provisions with substance. In many cases where the investor has been defrauded, the company will be bankrupt. An adequate bonding provision can protect such a defrauded investor.

B. Who Can Bring an Action Under the Mississippi Act?

Under section 5374 a sale of a security made in violation of the Mississippi Act is "voidable at the election of the purchaser," and under section 5371 the purchaser of a security has a right to bring suit to recover money paid for a security when the purchase was induced by the misrepresentation of a material fact. Therefore, under the two civil liability provisions only the "purchaser" of a security may bring suit.

Other than the statute of limitations, the most frequently encountered obstacle to a security purchaser bringing an action is the fact the said purchaser actively participated in the business venture which issued the security. A basic theory which prohibits success in a suit by a purchaser who has actively participated in the business enterprise is that of *in pari delicto,* which means that when both parties are equally wrong, "the position of the defendant is stronger."[40] This maxim dictates that a court will not grant a remedy when such a situation is presented.[41] Also, some courts have held that the doctrine of equitable estoppel can be used to defeat a purchaser's claim that the sale of a security was invalid because it violates the state Blue Sky Law.[42] The

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[40] Annot., 84 A.L.R.2d 479, 491 (1962).

[41] *Id.*

[42] *Id.* at 485.

Supreme Court of Nebraska has recently given a succinct statement concerning the situations in which estoppel or *pari delicto* will defeat a purchaser's claim, to wit:

> Conduct which constitutes participation sufficient to estop a purchaser or place him *in pari delicto* is difficult to generalize or define. Generally speaking, cases holding that the purchaser's conduct placed in *pari delicto* are those in which the purchaser's participation was in the original organization and management, or was prior to or in connection with the sale of the securities to him, or where his participation involved illegal securities transactions.[43]

An example of how far the theory of estoppel can be taken is the Tennessee case of *Tucker v. McDell's, Inc.*[44] In this case, the plaintiff had purchased 50 shares of stock in the defendant corporation for the price of $5,000.00. After purchasing this stock which had been issued in violation of the Tennessee Blue Sky Law, the plaintiff became a director and vice-president of the defendant corporation. The corporation was not successful, and liquidation proceedings were begun. The plaintiff tendered his stock and asked for the purchase price plus interest. The court held that plaintiff was estopped from rescinding his stock purchase because he had taken an active part in the management of the corporation, notwithstanding the fact that the active participation occurred only *after* plaintiff had purchased this stock.

Similar to the estoppel and *pari delicto* cases where the purchaser has actively participated in the issuing company are the "joint venture" cases. There is a conflict of authority over whether interests sold in pursuance of a joint venture must be registered under the state Blue Sky Laws. Some courts hold that since members of a joint venture group have equal rights in management and control of an enterprise and since profits from the venture would not be "solely from the efforts of others," the sale of securities therein does not fall within the scope of state securities regulation.[45] Other courts hold that if joint venturers decide to use the corporate form and prima facie subject themselves to state securities regulation, they will not be excused therefrom simply because the enterprise has the characteristics of a joint stock venture.[46]

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[43] Loewenstein v. Midwest Inv. Co., 181 Neb. 547, 149 N.W.2d 512, 515-16 (1967). *See also* Nash v. Jones, 224 Ga. 372, 162 S.E.2d 392 (1968).

[44] 50 Tenn. App. 62, 359 S.W.2d 597 (1961).

[45] *See, e.g.,* Polikoff v. Levy, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965).

[46] *See, e.g.,* Jackson v. Roberson, 90 Ariz. 405, 368 P.2d 645 (1962).

A joint venture exists when there is "a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in such losses as may be sustained."[47] The most prevalent test to determine whether a joint venture exists is the aforementioned characteristic of profits coming "solely from the efforts of others." This test was first announced by the United States Supreme Court in the case of *SEC v. W. J. Howey Co.*[48] in which it was held that there is an "investment contract" for purposes of the Securities Act of 1933 where "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[49]

The purchaser of a security is under no obligation to discover a violation of the state Blue Sky Law, but actual knowledge of the illegality of a sale of securities may prevent the purchaser thereof from recovering.[50] Under this reasoning a purchaser's participation in the issuing company may not be sufficient for the theories of *pari delicto* or estoppel, but may be sufficient to charge him with knowledge of the illegality.

No Mississippi case similar to those cited above has been found to limit the scope of "purchaser" as that word is used in sections 5371 and 5374 (b). Likewise, no case has been found where a Mississippi court denied a purchaser's action for rescission on the ground of *pari delicto* or estoppel. However, in the previously mentioned case of *United States Fidelity & Guaranty Co. v. Rice*,[51] the Mississippi Supreme Court, by way of dictum, indicated that a director of a corporation could not recover funds paid for a security issued by said corporation by bringing an action against the surety.

Section 410 (a) of the Uniform Securities Act provides that the "person buying the security" may bring an action to recover the consideration paid for a security. It can be assumed that "person buying the security" under the Uniform Act is the same as "purchaser" under the Mississippi Act. The only substantial difference with regard to who can bring an action under the respective statutes is that the Uniform Act in section 410 (d) specifically provides that the cause of action under that statute will survive the death of any person "who might have been a plaintiff or defendant."[52] This provision is known as the "survivability clause," and the Mississippi Act has no comparable provision.

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[47] Gales v. Weldon, 282 S.W.2d 522, 527 (Mo. 1955).

[48] 328 U.S. 293 (1946).

[49] SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 301 (1946).

[50] 1 CCH BLUE SKY L. REP. ¶ 1651 (1954).

[51] 241 Miss. 307, 130 So. 2d 924 (1961). *See also* p. 609 *supra.*

Thus, under the Mississippi Act any "purchaser" of a security may bring an action for recovery pursuant to sections 5374 and 5371. The purchaser's right to such actions, however, is limited by the extent to which he has actively participated in the enterprise which issued the security. This limitation may take the form of *pari delicto* or estoppel or may be found in the fact that the issuance of the security is excused from the state Blue Sky Law as being merely a joint venture interest. The Mississippi Supreme Court has not made any specific pronouncements on the application of *pari delicto,* estoppel, or joint venture, but it has hinted that it will follow the general notion that a purchaser will not be allowed to maintain an action against an issuer of security when the purchaser has participated actively in the affairs of the issuer.[53]

The use of the theories of *pari delicto,* estoppel, and joint interest to insure that a purchaser does not take advantage of his own misconduct is justified. But query whether the Tennessee court was justified in dismissing an action by a purchaser of illegally issued securities solely on the basis of his activities in the issuing company *after* the purchase of the securities.[54] It would seem that the issuance of the security is the critical transaction and that liability for illegally issued securities should not be overcome by subsequent participation by the purchaser in the issuing company.

As previously noted, the exemptions under the Mississippi Blue Sky Law confine its application to certain types of companies, most of which are relatively small and unsophisticated. Litigation in other jurisdictions indicates that the issues of *pari delicto,* estoppel, and joint venture permeate most cases concerning the issuance of securities by such companies. This leads one to believe that the emergence of these issues in civil actions under the Mississippi Blue Sky Law is inevitable. When the Mississippi Supreme Court faces the issue of the amount of participation in an issuer's affairs necessary to foreclose the civil liability provisions of the Mississippi Act, the purchaser's participation should be considered as of the time of the sale of the security. Also, the survivability provision in section 410 (d) of the Uniform Securities Act would be an excellent addition to the Mississippi Act. Even in the absence of an express provision, the majority view in favor of survivability would be an equitable rule for the Mississippi Supreme Court to adopt if faced with such an issue. Finally, the purchaser who has actual knowledge of the illegality of the sale of the security should not be barred from an action under the Blue Sky Law, if said purchaser did not actively participate in the affairs of the issuer. To hold otherwise would allow an issuer to escape liability by merely informing each prospective purchaser that the security offered has not been registered under the state Blue Sky Law.

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[52] Concerning this survivability clause, the Official Code Commentary to section 410(d) of the Uniform Securities Act is as follows:

> This subsection is designed to codify the majority view of the few cases which have ruled on the question of survivability under the state and federal securities statutes . . . . Although the question whether a statutory cause of action is assignable involves much the same considerations as whether it survives the death of either party, that question is left to the general law, whether decisional or under the general assignment statutes which exist in some states. 1 CCH Blue Sky L. Rep. ¶ 4940 (1971).

[53] United States Fid. & Guar. Co. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

[54] *See* Tucker v. McDell's, Inc., 50 Tenn. App. 62, 359 S.W.2d 597 (Tenn. Ct. App. 1961).

C. *Persons Liable under the Mississippi Act*

Section 5374 (b) of the Mississippi Act provides that the purchaser of a security issued in violation of any provision of the Mississippi Act is "entitled to recover *from the seller* in an action at law . . . the full amount paid for such security, with interest from the date of purchase" (emphasis added). Section 5371 provides that a purchaser "shall have the right to bring suit upon the bond provided for by section 6 [section 5365]" for the purchase price, interest, and attorney's fees when the sale of a security is induced by misrepresentation of a material fact. Thus, both of the civil liability provisions of the Mississippi Act are narrowly drawn with regard to persons liable thereunder. Mississippi is one of the few states limiting actions for statutory rescission to those against the "seller."[55] This is contrasted with section 410 (b) of the Uniform Securities Act which gives a detailed listing of the persons who can be liable thereunder as follows:

> Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so

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[55] *See* 3 L. Loss, *supra* note 1, at 1637.

> liable sustains the burden of proof that he did not know, and in [the] exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.[56]

The purpose of this section will be to analyze the relevant Iississippi cases in order to construct a general outline of the persons iable under the Mississippi Act. After the Mississippi cases will be a liscussion of cases from other jurisdictions to give a more complete icture of persons generally liable under Blue Sky Laws. It is imortant to keep in mind that section 5371 allows an action upon he bond posted in accordance with section 5365, without mentioning he liability of specific persons, while the statutory rescission provision section 5374 (b)) allows an action against the "seller." This distincion is especially important when noting that the section 5371 is pplicable only if the issuer has complied with the Mississippi Act; nd where the allegation of fraud is directed toward an issuer which as not complied with the Mississippi Act, the plaintiff must rely upon common law action or upon the statutory rescission provision.[57] As vill be subsequently noted in some detail, inability to come within ection 5371 is significant because it is the only provision allowing he plaintiff to recover attorney's fees.[58]

1. The Mississippi Cases

The 1933 case of *White v. Stewart*[59] presents a factual situation vhich crystalizes the rules governing which persons are liable under he Mississippi Act. In this case, the plaintiff purchased 200 shares f stock in Baird's Television, Incorporated, a foreign corporation, from lefendants who were doing business as brokers in Jackson, Mississippi. his was an ordinary purchase of securities of a foreign corporation rom a local broker, except that the securities were not registered nder the Mississippi Act. After discovering that this stock had little, f any, market value, the plaintiff brought an action against the brokers or the cash which had been paid for the stock and for a return of hree promissory notes which had also been given as consideration for he stock. The plaintiff based her action on the Mississippi Act and he premise that she was induced to purchase the stock by means of a fraudulent representation. The lower court held in favor of the plaintiff, but on appeal the Supreme Court of Mississippi reversed and dismissed the bill.

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[56] UNIFORM SECURITIES ACT § 410 (b).

[57] *See* White v. Stewart, 166 Miss. 694, 145 So. 747 (1933).

[58] *See* p. 626 *infra.*

[59] 166 Miss. 694, 145 So. 747 (1933).

The court held that the predecessor of section 5371 was not controlling because it applied only to suits against investment companies which had complied with the Mississippi Act. Since the issuer, Baird's Television, Incorporated had not complied with the statute and the defendant brokers were not an "investment company," the court held that section 5371 was not of any assistance to plaintiff. The court noted that Baird's Television, Incorporated also was not an "investment company" under the Mississippi Act because it had not sold nor offered for sale any of its stocks in Mississippi. The court stated:

> [T]he appellants [brokers] sold stock of which they were the absolute owners, issued by a corporation not shown to be an investment company, within the meaning of the statute. Such sales are not prohibited by the Blue Sky Law.[60]

The court also dismissed the common law claim, holding that the alleged fraudulent statements made by the defendants' agent in the sale of the stock were merely expressions of opinion, and, in any event, that the written contract for the sale of the stock excluded any oral agreement made by the plaintiff relative to the stock.

In 1935, the Mississippi Supreme Court in the case of *Mississippi Power Co. v. May*[61] encountered a case similar to *White v. Stewart*. In the *May* case the plaintiff had paid $5,000.00 for defendant's preferred stock. The plaintiff's action for recovery of the purchase price plus interest and attorney's fees was grounded on two counts: one under common law fraud and deceit and the second under the Blue Sky Law. There was no proof that the defendant corporation had qualified and given bond under the Mississippi Act. The jury returned a verdict in favor of the plaintiff in the amount of $6,500.00. On appeal, the Mississippi Supreme Court reversed and remanded, holding that it appeared that the jury had held for the plaintiff on the basis of the second count which stated a cause of action under the Blue Sky Law, and since there was no proof that the defendant had complied with the Blue Sky Law, there was no cause of action thereunder.[62] The court cited the *White* case for this proposition and stated:

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[60] *Id.* at 702, 145 So. at 749.

[61] 173 Miss. 580, 161 So. 149 (1935).

[62] *Id.* at 592-93, 161 So. at 756 (suggestion of error).

> The Blue Sky Law . . . is materially different from the common-law action for fraud and deceit, or the equitable action of rescission. Under the Blue Sky Law, any material representation made by a selling agent, whether in the scope of his authority or not, where such representation is false, gives the buyer of stock the right to bring suit for rescission, and said act also provides for attorney's fees.[63]

On suggesstion of error the plaintiff contended that if defendant had not complied with the Blue Sky Law, the sale of preferred stock to plaintiff was void, thus entitling plaintiff to recover the purchase price with interest, but without attorney's fees. The court dismissed this contention, holding that it must review the case on the same theory on which it was presented to the jury.[64] The court stated:

> We held, and now reaffirm our intention to hold, that a plaintiff cannot recover upon the Blue Sky Law unless the selling company has complied therewith, and this must be affirmatively proved. . . . We leave undecided . . . and until those questions shall be definitely presented on full argument, whether an intending purchaser must inquire or whether he need not inquire as to the seller's compliance with the Blue Sky Law; also whether a sale, by one who should comply, but is shown not to have done so, is void, or voidable or valid.[65]

The case of *Mississippi Power Co. v. Bennett*[66] is almost identical to the *May* case, and apparently involved the same selling practice by the Mississippi Power Company which had been attacked in the *May* case. As in the *May* case, the cause of action in *Bennett* was founded upon two counts: one based on common law fraud and the other based on the Mississippi Blue Sky Law. However, in *Bennett* the Mississippi Supreme Court affirmed the verdict in favor of the plaintiff for recovery of the purchase price. The court acknowledged the existence of the second count which was based on the Blue Sky Law, but did not give a meaningful analysis of the law's relevance to the plaintiff's recovery. The only indication as to the applicability of the Blue Sky Law in *Bennett* is found in the dissent where it was stated that the majority had "eliminated from their consideration the count under the Blue Sky Law."[67] The reason for this elimination is a mystery.

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[63] *Id.* at 591-92 (opinion of court).

[64] *Id.* at 593, 161 So. at 756.

[65] *Id.*

[66] 173 Miss. 109, 161 So. 301 (1935).

[67] *Id.* at 137, 161 So. at 310 (dissenting opinion).

The difficulties which the court had in *White* and *May* are mainly attributable to the absence of a statutory provision making the sale of unregistered securities void or voidable. Under section 5374(b) of the present act, "[e]very sale or contract of sale of any security made in violation of any provision of [the Mississippi Blue Sky Law] is voidable at the election of the purchaser." If this provision had been in the statute at the time of the *White* and *May* cases, the court would have had no problem in allowing the plaintiffs to recover the purchase prices with interest. Even in the absence of such a provision, the court could have held that the sale of unregistered securities was unlawful and that an unlawful sale is at least voidable.[68] The transactions in *White* and *May* are precisely the type of transactions that Blue Sky Laws were meant to cover. To allow the seller to escape liability because the securities had *not* been registered is irony of the highest order and is contrary to the very purpose of the statute. The court in *White* found significance in the fact that the defendant brokers were "absolute owners" of the stock which the plaintiff purchased. If this were the determining factor, all "firm commitment" underwriting would be immune from the Mississippi Act.

The holding in *White* and *May* that the predecessor of section 5371 was limited to situations in which the issuer had complied with the Mississippi Blue Sky Law is inescapable in view of the wording of the section; but this should not have prevented the court from holding that the sales were unlawful, and therefore voidable, because the securities had not been registered. Fortunately, the present statute would allow an action under section 5374(b) for the sale of unregistered securities, and the fact that section 5371 is limited to registered securities is not a serious handicap as it was in the days of *White* and *May.*

As stated previously, section 5371 allows an action "upon the bond" posted by an investment company when the sale of a security is induced by the misrepresentation of a material fact. Does this mean misrepresentation only by the "seller"? Language in the case of *Bankers' Mortgage Co. v. McMullan*[69] indicates that the misrepresentation necessary to permit an action under section 5371 can be made "by an officer, agent, employee, promoter, or trustee of an investment company in effecting a sale of its stocks, bonds, or other securities."[70] This connotes, therefore, that while section 5374(b) is limited to actions against the "seller," section 5371 is not so limited. That section 5371 is not limited to misrepresentations by the "seller" is justified because of the distinct possibility that a purchaser could be induced to buy a security by misrepresentations made by someone other than the actual seller of the security.

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[68] *Cf.* Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927).

[69] 165 Miss. 382, 141 So. 331 (1932).

[70] *Id.* at 396, 141 So. at 334.

2. *Guynn v. Shulters*

Probably the most significant case on civil liability under the Mississippi Blue Sky Law is the 1955 case of *Guynn v. Shulters*.[71] This case is important because it involves an excellent example of the type of investment with which the Mississippi Act should be concerned. Because this case so readily lends itself to analysis from a policy standpoint, it will be presented in considerable detail.

The *Guynn* case involved six separate suits by subscribers of the capital stock of Barton's, Incorporated, an Alabama corporation. The facts showed that on January 27, 1950, a Mrs. Barton sold a chicken farm and business which she operated in Grand Bay, Alabama, to her husband, E. S. Barton, and Charles A. Guynn. In April, 1950, Barton and Guynn decided to explore the possibility of incorporating and enlarging their chicken business. Guynn, who was employed in Pascagoula, Mississippi, contacted some of his fellow employees about investing in his chicken business. Several of the prospective investors met at Barton's residence in Grand Bay on April 27, 1950, to discuss the desirability of purchasing stock and organizing the corporation. On May 2, 1950, another meeting was held at Barton's residence and several persons, including most of the plaintiffs, signed a "Subscription List" which obligated them to purchase stock at $100.00 per share in the corporation to be created.

The business was incorporated in Alabama on May 5, 1950, with the domicile in Grand Bay, Alabama. The capital structure was 250 shares of common stock at $100.00 per share for a total of $25,000.00. It was decided that Barton and Guynn would transfer the chicken business to the corporation for an agreed price of $8,100.00 and that they would each receive forty shares of stock in exchange. The auditor of the business, Watson, received one share, so that a total of eighty-one shares was issued for the property transferred to the corporation. All of the plaintiffs paid for their stock *after* the incorporation of May 5, 1950, and the court indicated that in addition to the eight plaintiffs herein at least eight to ten other persons subscribed for stock in the corporation. Evidence presented in the trial showed that plaintiff's participated in several shareholders meetings and that some of the plaintiffs served the corporation in various capacities.

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[71] 223 Miss. 232, 78 So. 2d 114 (1955).

In July, 1950 it was reported that a disease known as pullorum had infected the chickens causing the death of about 14,000 of them. The business became a losing venture and the investors instituted suits to recover the price paid for the stock with interest from the dates of purchase. In total, there were six different suits with eight plaintiffs in actions against the corporation, Mr. and Mrs. Barton, and Guynn. One suit, instituted by three plaintiffs on October 13, 1950, claimed that the stock had been issued in violation of the Mississippi and Alabama Blue Sky Laws and that the purchase of the stock had been induced by material false representations. The other five suits were filed in May 1951, and sought recovery of the purchase price on the grounds that the stock was issued in violation of the Mississippi and Alabama Blue Sky Laws. These five suits made no claim of false representations. The defendants admitted that neither they nor Barton's, Incorporated had complied with the Blue Sky Law of Alabama or Mississippi. Judgments in favor of the plaintiffs were rendered in all six cases and defendants appealed to the Mississippi Supreme Court.

Initially, the court had to determine whether Alabama or Mississippi law would apply, as the plaintiffs had alleged a violation of the Blue Sky Laws of both states. The court held that Alabama's law would not apply because the purchases of the stock were made in Mississippi. No case was cited for this proposition and the court did not discuss the significance, if any, of the fact that the "Subscription List" had been signed in Alabama, that the organizational meetings had been held in Alabama, and that the business was located and incorporated in Alabama. As will be subsequently noted in some detail, the court looked primarily to the signing of the "Subscription List" and not to the actual purchase of the stock to determine liability under the Mississippi Blue Sky Law. It is therefore strange that the court did not even mention the "Subscription List" with regard to the choice of law.[72]

From the prior description herein of the coverage of the Mississippi Blue Sky Law, one would asssume that it surely applied to the sale of securities in the *Guynn* case. Approximately eighteen persons had actually subscribed to the stock of this corporation, and it can be easily surmised that the number of offers was well in excess of eighteen.

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[72] As a result of the recent decision of Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968), in which the Mississippi Supreme Court adopted the modern choice of law doctrine, the analysis of the applicability of the Alabama law might be different if a similar case were to arise.

There is no doubt that the common stock which the corporation issued came within the definition of "security" and there was no specific exemption in the Mississippi Act. Yet, the Mississippi Supreme Court reversed all six cases and held that there was no liability under the Mississippi Blue Sky Law. Tracing the court's reasoning is instructive.

The court gave several reasons why the Mississippi Blue Sky Law would not apply, any one of which standing alone, would have been sufficient to rule in favor of the defendants. First, the court held that "preorganization stock subscribers, under the circumstances here disclosed, have no right of action for failure of the corporation, or one who induces them to purchase stock, to comply with the Blue Sky Laws of Mississippi."[73] The court acknowledged a conflict of authority on this point and ruled that because the corporation was not in existence at the time the subscriptions were solicited, there was no way to comply with the Mississippi Blue Sky Law. The problem with this reasoning is that it looks to the time of subscription and ignores the actual sale and issuance of the stock. To hold that a promoter can solicit and obtain subscriptions to stock of a corporation to be created in the future should not mean that the subsequently formed corporation can issue stock in violation of the Blue Sky Law. To hold otherwise allows evasion of the Blue Sky Law by simply finalizing all stock subscriptions prior to incorporation and issuing the stock in accordance with the subscriptions. This is exactly what the *Guynn* decision appears to condone. It is respectfully submitted that the Mississippi Supreme Court was wrong on this point. It should have looked to the actual sale to determine if the stock was issued in violation of the Blue Sky Law.

With regard to the liability of the corporation itself, the court again focused on the time of subscription as opposed to the time of the actual sale. The court stated:

> It is at once evident that Barton's, Inc., not yet in existence, could not have complied with the . . . requirements [of the Blue Sky Law] as a prerequisite to the preorganization negotiations to subscribe for future stock of the corporation when and if formed.[74]

This statement is absolutely correct, but what about complying with the Blue Sky Law prior to issuance of the securities? This is the crucial question. The court stated further:

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[73] Guynn v. Shulters, 223 Miss. 232, 247, 78 So. 2d 114, 119 (1955).

[74] *Id.* at 249, 78 So. 2d at 120.

> We do not think that [the Blue Sky Law] was intended to apply to such a situation. It was as much the duty of one subscriber as that of another to see that the corporation complied with the law. However, had the corporation, or appellants, complied with the Blue Sky Law such compliance would have occurred after complainants had agreed to subscribe to the stock. There had been no violation of law, or failure to comply therewith, when complainants subscribed to the stock.[75]

The court dug an even deeper hole for itself with its selection of quotations from the authority on which it relied. It quoted from *Watkins v. Public Service Life,*[76] a Washington case involving a claim for compensation for services rendered in the sale of pre-organizational stock subscriptions. The defense was that plaintiff had not complied with the Washington Securities Act when he rendered the services. The Mississippi Supreme Court quoted from the opinion of the Washington Supreme Court, to wit: "His services were all rendered prior to the time that the prospective corporation could legally issue securities, *the sale and disposition of which would be regulated by the Securities Act.*"[77] This statement clearly shows that the Washington Supreme Court would apply the Blue Sky Law to the sale and issuance of the securities, notwithstanding the fact that the issuance was pursuant to a preincorporation subscription. Similarly, the Mississippi Supreme Court states: "Subscriptions to stock are to be distinguished from sales of stock by a corporation,"[78] thus expressly acknowledging the very point which the court chose to otherwise ignore.

As a final reason for holding that the Blue Sky Law was not applicable, the court held that defendants were not agents or dealers under the Mississippi Act and that they were therefore not liable thereunder. The problem with this is that the Mississippi Act which was in force at the time of the *Guynn* case required that certain securities be registered before issuance, without reference to whether or not the dealer or person selling the security was registered. In other words, an unregistered securtiy sold by a registered dealer would have been unlawful, and vice-versa. So the fact that defendants were not dealers under the Mississippi Act did not cure the defect of the unregistered securities.

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[75] *Id.* at 250-51, 78 So. 2d at 120.

[76] 188 Wash. 280, 62 P.2d 465 (1936).

[77] Guynn v. Shulters, 223 Miss. 232, 247-48, 78 So. 2d 114, 119 (1955) (emphasis added).

[78] *Id.* at 248, 78 So. 2d at 119, *quoting* 14 FLETCHER CYCLOPEDIA CORPORATIONS § 6747, at 192.

3. The *Guynn* Situation under Present Mississippi Law

It is instructive to apply the civil liabilities provision of the present Mississippi Blue Sky Law to the factual situation in the *Guynn* case. Under section 5361 (b) Barton's, Incorporated would be a "foreign investment company." Section 5362 provides that every foreign investment company must register its securities with the secretary of state before selling or offering for sale such securities in the state of Mississippi. Section 5374 (b) provides that the sale of any security made in violation of the Mississippi Act is voidable at the election of the purchaser and that said purchaser can recover the price paid from the "seller." Perusal of sections 5384 and 5384.5 shows that there is no apparent exemption for the securities issued by Barton's, Incorporated. Therefore, we have the sale of an unregistered security by a foreign investment company in violation of the Mississippi Act.

What should an attorney do when faced with the organization of a corporation similar to the one involved in the *Guynn* case? The first step should be to seek an exemption so that the expenses of compliance can be avoided. Section 5384.5 (i) exempts the offer and sale of securities by a domestic investment company when there are ten or fewer shareholders after the sale is completed and where neither the offer, sale or authorized capital exceeds $50,000.00. Discounting the conflict of laws questions in *Guynn* and hypothecating Barton's, Incorporated as a domestic investment company, this exemption would have been ideal to allow the Bartons and Guynn to raise the necessary capital without having to comply with the Mississippi Blue Sky Law. To be on the safe side, the attorney should obtain a certificate of exemption from the secretary of state. The issuance of a formal certificate of exemption by the secretary of state is prima facie evidence that the securities are exempted from the Mississippi Act.[79]

4. Cases from Other Jurisdictions

As stated previously, most states do not limit recovery under their Blue Sky Law to actions against the "seller" of the security as Mississippi does. A brief survey of cases from other jurisdictions is useful.

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[79] The author hopes that his criticism of the Guynn decision will be acceptable. Evidently, the attorney for the plaintiffs in the *Guynn* case was quite upset with the decision rendered by the Mississippi Supreme Court. The brief which he submitted in a suggestion of error was stricken from the files because of disrespect to the court. The Mississippi Supreme Court stated: "Language such as that used by the attorney in his suggestion of error and brief serve no purpose; it is of no aid to the Court and of no service to the clients in whose behalf it is used." Guynn v. Shulters, 223 Miss. 232, 262, 78 So. 2d 793 (1955) (suggestion of error overruled).

With regard to the liability of a stockbroker in a normal stock transaction, some courts have held that the broker is not liable for selling an unregistered security,[80] while other courts have held that the broker is liable in such cases.[81] Usually, where no liability is found, the reason is that the broker was merely acting as an agent for the purchaser.[82] Frequently the reason for broker liability is that the broker was a decisive factor in the sale of an unregistered security.[83] The essential difference seems to be that if the broker initiates the sale of an unregistered security, he may be liable to the purchaser; but, if the purchaser initiates the transaction and the broker merely carries out the purchaser's request, the broker will not be liable.[84] In some jurisdictions civil liability can be found against a person who has done *any* act in furtherance of a sale of an unauthorized security.[85]

Officers and directors of a corporation can be liable under a Blue Sky Law if they participate in the sale of an unauthorized stock or if they participate in making false and fraudulent misrepresentations to induce others to purchase stock.[86] Officers and directors are not personally liable simply because they serve in their respective capacities, but this fact does not relieve officers and directors of pre-existing responsibilities, the violation of which may result in personal liability.[87] In Mississippi, officers and directors would be liable under section 5374 (b) only if they actually sold the stock, while liability under section 5371 would arise if the corporation had posted bond under section 5365 and if the officer or director induced the sale of stock through a misrepresentation.

In California, liability for false and misleading statements is generally limited to a person who buys or sells a security, although in some instances this liability extends to other specifically identified persons.[88] These collateral persons who may be liable do not have the same standard of care as the principal actor.[89] The Michigan courts have held that anyone who actively assists in negotiations for the sale of securities in violation of the Blue Sky Law is liable to the purchaser.[90] The Supreme Court of Oregon recently held that a person who merely made a loan to a promoter was liable under the Blue Sky Law because he "participated" and "aided and abetted" in the sale of the stock.[91]

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[80] *E.g.,* Fine v. Bradford, 190 Ga. App. 380, 136 S.E.2d 147 (1964).

[81] *E.g.,* Gonia v. E.I. Hagen Co., 251 Ore. 1, 443 P.2d 634 (1968).

[82] *E.g.,* Fine v. Bradford, 190 Ga. App. 380, 136 S.E.2d 147 (1964).

[83] *E.g.,* Gonia v. E.I. Hagen Co., 251 Ore. 1, 443 P.2d 634 (1968).

[84] This distinction is explained in 1 CCH BLUE SKY L. REP. ¶ 3611 (1954):

> A dealer or broker who, in the course of business carried on by him as a dealer or broker, sells stock which is not qualified or registered, is liable to the purchaser for the amount of the purchase price in a suit for rescission of the sale. However, if the purchaser has employed the dealer or broker to act as agent for him in the purchase of the stock, the dealer or broker cannot be held liable, since in such situation he was not the "seller" of the securities. Dealers are liable for the acts of their licensed salesmen.

[85] *See* Annot., 59 A.L.R.2d 1030 (1958).

[86] 1 CCH BLUE SKY L. REP. ¶ 3615 (1954).

[87] *See* Davis v. Walker, 104 N.W.2d 479 (Neb. 1960).

D. *The Blue Sky Law as a Defense in Civil Actions*

Several cases have arisen in Mississippi where violation of the Blue Sky Law was put forth by a defendant who was trying to escape liability on a promissory note given for securities. The court held that in Mississippi the violation of the Blue Sky Law does not constitute a defense in an action on a negotiable instrument in the hands of an innocent purchaser for value without notice.[92]

The 1927 case of *Dixie Rubber Co. v. Catoe*[93] presents an example of using the Blue Sky Law for defense in a civil action. This case involved an action by Dixie Rubber Company, a Mississippi corporation domiciled in Tennessee, against one L. C. Cadenhead and his sureties on a bond posted by Cadenhead. Cadenhead had sold securities issued by the plaintiff corporation and retained $44,000.00 of the proceeds therefrom as his commission of 25 percent. These securities were not registered under the Mississippi Blue Sky Law. Cadenhead soon realized that his contract with the plaintiff was void because the securities had not been registered. Accordingly, Cadenhead agreed to pay plaintiff $52,129.60 and gave him a bond in this amount. Subsequently, Cadenhead refused to pay anything to the plaintiff, and a suit was instituted against Cadenhead and the sureties on the bond. The defendants claimed no liability because the securities were sold in violation of the Blue Sky Law.

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[88] MARSH & VOLK, PRACTICE UNDER THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968 450-51 (1968).

[89] *Id.* at 451. Concerning this standard of care, the authors state:

> The liability imposed upon these collateral persons solely by virtue of their status or relationship to the vender or purchaser of the security should be based upon actual knowledge of the false or misleading nature of the statement or upon knowledge of facts which gave the collateral person reasonable grounds to know that the statement was false or misleading, whether or not he in fact believed it to be so.

[90] 1 CCH BLUE SKY L. REP. ¶ 3621 (1954).

[91] Adamson v. Lang, 389 P.2d 39 (Ore. 1964).

[92] Gordin v. Bank of Forest, 170 Miss. 56, 154 So. 341 (1934); Tallahatchie Home Bank v. Aldridge, 169 Miss. 597, 153 So. 818 (1934); Riddle v. Tallahatchie Home Bank, 160 Miss. 141, 133 So. 128 (1930); First Nat'l Bank v. C.W. Leeton & Bros., 131 Miss. 324, 95 So. 445 (1923).

[93] 145 Miss. 342, 110 So. 670 (1927).

The Supreme Court of Mississippi affirmed the lower court decision in favor of the defendants stating:

> Having failed to get permits to sell its stock in Mississippi and Tennessee, under the laws of those states appellant had no right to sell its stock in those states. Therefore, under the laws of both Mississippi and Tennessee, appellant's contracts for the sale of its stock in those states were unlawful and void, and therefore unenforceable.[94]

In the 1967 case of *Gulf Land & Development Co. v. McRaney*,[95] the Mississippi Supreme Court followed its ruling in the *Dixie Rubber Co.* case. The *McRaney* case involved a scheme where the Gulf Land Company was issuing its capital stock in exchange for mineral deeds on land in Mississippi. The stock had not been registered pursuant to the Mississippi Blue Sky Law. In an action to confirm title and cancel a mineral deed which had been given in exchange for this unregistered stock, the Mississippi Supreme Court granted the requested relief, holding that the transaction in which the mineral deed was obtained was "utterly void" and subject to collateral attack.

The *Dixie Rubber Co.* and *McRaney* cases illustrate the extent to which illegally issued stock can permeate matters collateral to actual sale. Cognizance of these interpretations will allow the attorney to be aware of any transaction which may be tainted by illegally issued securities. These cases also show that the Mississippi Supreme Court will declare void all collateral matters of an illegal stock sale, limited only by the protection given to an innocent purchaser for value without notice.

E. Statute of Limitation

Section 5374(b) provides that an action thereunder must be commenced within two years after the purchaser discovered or should have discovered that the security was issued in violation of some provision of the Mississippi Act or that the sale of the security was induced by misrepresentation of a material fact. The other civil liability provision, section 5371, does not make reference to a statute of limitation, but since it allows actions where the sale is induced by misrepresentation and since the statute of limitation provision in 5374 (b) makes specific reference to such actions, it can be surmised that the statute of limitations is the same under section 5371 and section 5374 (b).

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[94] *Id.* at 347-48, 110 So. at 671.

[95] 197 So. 2d 212 (Miss. 1967).

The statute of limitation under the Mississippi Blue Sky Law is unique because it runs from the date that the buyer discovered or should have discovered the violation or misrepresentation; whereas, the statutes of limitation in most other states run from the date of the illegal sale or contract.[96] Also, fifteen of the eighteen states which have an express voidability provision, as Mississippi has, have an additional provision that a recission offer will reduce the normal period of the statute of limitations.[97] Mississippi is one of the three states with a voidability provision and no reduction in the period of statute of limitations upon a recission offer by the seller of the security.[98] This situation has been summarized by Professor Loss as follows:

> The three states with effective voidability provisions unaccompanied by rescission offer mechanisms are Arizona, Louisiana, and Mississippi . . . . Arizona and Mississippi are two of the three states . . . whose statutes of limitations refer to discovery of the violation . . . . In those three states the person liable may, of course, reduce the limitation period by notifying the other party of the violation; but obviously he cannot do this and also let sleeping dogs lie.[99]

Section 410 (e) of the Uniform Securities Act provides that no action thereunder can be commenced more than two years "after the contract of sale." It also contains a rescission offer provision to the effect that no action can be commenced if the buyer of a security has received an offer to refund the purchase price plus interest less income derived from the security and has failed to accept the offer within thirty days of receipt. It has been held in a jurisdiction which has adopted the Uniform Securities Act that fraudulent concealment of an untrue statement does not toll the statute of limitations.[100]

Under the Mississippi Blue Sky Law, civil liability can arise upon the sale of a security in two basic ways: (1) by a sale made in violation of some provision of the Mississippi Act (section 5374(b)); or (2) by a sale induced through the misrepresentation of a material fact (section

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[96] *See* 3 L. Loss, *supra* note 1, at 1640.

[97] 6 L. Loss, *supra* note 1, at 3792 (Supp. 1969).

[98] *Id.*

[99] *Id.* at 3793.

[100] Martin v. Pacific Ins. Co., 431 S.W.2d 239 (Ark. 1968).

5371). There is no readily observable reason why the statute of limitations for these two sections must be the same. For an action based on the sale in violation of some provision of the Act, the statute of limitations should be two years from the contract of sale, and for the action based on misrepresentation of a material fact, the statute of limitation should be two years from the date the purchaser discovered or should have discovered the existence of the misrepresentation. In the latter case, a provision for a rescission offer similar to the one found in section 410(e) of the Uniform Securities Act would be appropriate.

These changes in the Mississippi Act would make it more equitable. Under the present Act a seller of a security could make some technical violation of the Act and find himself faced with a statutory rescission action ten or fifteen years after the sale of the security. By making the statute of limitation two years from the contract of sale in such cases, the consequences of the registration process become more predictable, thus aiding the business planner without unduly compromising the rights of the investing public. But why should such certainty be encouraged in the case of a sale of a security by misrepresentation? Here the possible harm to the investing public is greater, and the activities of the seller usually more pernicious. In the misrepresentation cases, therefore, the statute should run from the discovery of the misrepresentation, but this should be limited by a rescission offer provision. Otherwise, a purchaser upon discovery of the misrepresentation could wait for almost two years to file his action, making such filing dependent upon the rise or fall in the value of his security.

It should be noted that the statute of limitation under a Blue Sky Law does not affect the statute of limitation for common law actions such as fraud, deceit, and rescission.[101]

F. *Amount Recoverable*

Under section 5371 in an action upon the bond posted by a seller in compliance with the Mississippi Act, the plaintiff may recover "the money paid, or the actual value of the property given, or the labor performed in exchange for such stocks, bonds or other securities, with legal interest from the date of payment or the performance of the service, or the transfer of the property, and reasonable attorney's fee." In other words, the plaintiff may recover the purchase price plus interest and attorney's fees. However, it must be remembered that section 5371 is limited to an action "upon the bond provided for by section 5365," which means that the issuer or dealer must have complied with the Mississippi Blue Sky Law. The statute provides further that "no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being filed in excess of the amount of the bond the secretary of state may require a new bond." Therefore, the amount recoverable under section 5371 is the purchase price plus interest and attorney's fees, not to exceed the amount of the bond posted under section 5365.[102]

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[101] Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

Under section 5374 (b) the purchaser may recover purchase price plus interest less any income received from the security. One obvious difference between the amounts recoverable under sections 5371 and 5374 (b) is that there is no provision for recovery of attorney's fees under section 5374 (b). Two other differences are that section 5371 is limited to the amount of the bond while section 5374 (b) has no such limitation, and section 5374 (b) expressly provides for reducing the amount recoverable by the income received on the security while section 5371 has no such reduction.

Under section 410 (a) of the Uniform Securities Act, the purchaser may recover

> the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.[103]

The provision on amount recoverable in section 410(a) of the Uniform Securities Act is clearly superior to the provisions in the Mississippi Act. The aforementioned inconsistencies between sections 5371 and 5374 (b) of the Mississippi Act make it confusing and tricky. The absence of a provision for attorney's fees in section 5374 (b) and the limitation to the amount of the bond in section 5371 are significant deficiencies in the Mississippi Act.

G. *Section 5380*

Section 5380 is the general anti-fraud provision of the Mississippi Blue Sky Law. Prior to 1958, Mississippi had no such provision.

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[102] *But see* United States Fid. & Guar. Co. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

[103] UNIFORM SECURITIES ACT § 410 (a).

Section 5380(a) makes it unlawful to make a false statement in any document or financial statement which must be filed under the Mississippi Act. Section 5380(b) makes it unlawful to employ any device or scheme or engage in any practice or course of business which would defraud a "purchaser, seller, or investor." Section 5380(b) also makes unlawful the representation that filing a registration statement with the secretary of state means that the merits of the security have been approved or recommended. Under section 5380(c) it is unlawful to sell or offer for sale any optional preorganizational incentive security during the period and one year after said period during which a certificate of authority granted to the issuer is outstanding.

Section 5380 does not specify a remedy for the fraudulent practices which it condemns. Therefore, a purchaser who has been defrauded within the provisions of section 5380 would have a cause of action under section 5374(b), which, it will be remembered, has no provision for recovery of attorney's fees. The ridiculous result of this is that if the issuer has complied with the Mississippi Blue Sky Law, a purchaser who has been defrauded can recover the purchase price, interest, and attorney's fees up to the amount of the bond posted, while if the issuer has not complied, the defrauded purchaser can recover only the purchase price and interest.

III. SUMMARY

The Mississippi Blue Sky Law has not changed significantly since 1942. The lack of cohesiveness in the civil liability provisions as shown in the foregoing discussion is indicative of the piecemeal manner in which the statute has been constructed. The inconsistencies in the decisions by the Mississippi Supreme Court in civil liability cases arising under this statute occur mainly because of the confusing organization of the civil liability provisions. The entire Mississippi Blue Sky Law badly needs an overhaul, and the proper action by the Mississsippi legislature would be to completely wipe the slate clean and enact a new Blue Sky Law which is responsive to the present needs of securities regulation in the state of Mississippi. But it is questionable whether a verbatim acceptance of the Uniform Securities Act would be the proper answer to this need for legislative reform. Mississippi is still a relatively rural state with a comparatively unsophisticated investing public which requires stringent protection from unscrupulous corporate promoters. On the other hand, Mississippi is attempting to encourage industry to locate and expand within the state, and an unduly restrictive Blue Sky Law would hamper industrial growth.

The Uniform Securities Act is an excellent model for Mississippi to follow, but it should be molded to fit Mississippi's peculiar needs. This molding process, if done correctly, will take a considerable amount of time. In the interim, immediate action should be taken to change the civil liability provisions. It is submitted, therefore, that the Mississippi legislature enact as soon as possible the following provision to control civil liability under the Mississippi Blue Sky Law.

IV. Suggested Civil Liability Section for the Mississippi Blue Sky Law

(1) Any person who

(a) offers or sells a security in violation of any provision of this act or

(b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,

is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

(2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several people so liable.

(3) Any tender specified in this section may be made at any time before entry of judgment.

(4) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(5) For a cause of action arising under section 1 (a) of this statute, no person may sue more than two years after the contract of sale. For a cause of action arising under section 1 (b) of this statute, no person may sue more than two years after such person, by the exercise of ordinary care, should have discovered that the sale was made by means of an untrue statement of a material fact.

(6) No person may sue under this statute

  (a) if the buyer received a written offer, before suit and at a time when he owned the security to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt, or

  (b) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer within thirty days of its receipt.

(7) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(8) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.

(9) Any person or persons having a cause of action under this act shall have the right to bring suit upon the bond provided for by section 5365. This right shall in no way limit or alter the amount recoverable under this act.

(10) Section 5374 (b), with the exception of the first paragraph therein, and section 5371 are hereby repealed.

Comments

The proposed civil liability provisions are substantially taken from the Uniform Securities Act. The provisions are drafted so that they can be adopted immediately without disrupting the general scheme of the Mississippi Blue Sky Law. If and when the Mississippi legislature decides to adopt the entire Uniform Securities Act, these civil liability provisions can be easily retailored to be placed back in their original context. Comments about the individual sections are as follows:

Section 1 — Section 1 (a) is a slightly changed version of section 410 (a) (1) of the Uniform Securities Act, and section 1 (b) is a verbatim copy of section 410 (a) (2) of the Uniform Act. Section 1 would allow recovery of consideration paid, plus six percent and reasonable attorneys' fees. This differs from the present Mississippi Act because it fixes a specific rate of interest and it would insure recovery of attorneys' fees for the type of actions presently covered by section 5374 (b) under which there is no provision for recovery of attorneys' fees. Also, it allows an action for damages if the purchaser no longer has the security, whereas the present Mississippi Act requires a tender of the security purchased.

Section 2 — This is a verbatim copy of section 410 (b) of the Uniform Securities Act. It differs significantly from the present Mississippi provisions because it contains a specific group of persons who can be liable. Under the present sections 5371 and 5374 (b), no reference is made to specify persons who may be liable.

Section 3 — This is a copy of section 410 (c) of the Uniform Securities Act.

Section 4 — This is a copy of section 410 (d) of the Uniform Securities Act and is commonly referenced as the "survivability clause." There is no such provision in the present civil liability sections under the Mississippi Act.

Section 5 — This is a provision combining the statutes of limitation in the Mississippi Blue Sky Law and the Uniform Securities Act. In the case where the cause of action is based on noncompliance with some procedural aspect of the Blue Sky Law, the statute of limitation will be two years from the contract of sale. However, where the cause of action is based on the misrepresentation of a material fact, the statute of limitation will be two years from the time the purchaser should have discovered this untrue fact.

Section 6 — This is a copy of part of section 410 (e) of the Uniform Securities Act. The provision gives the seller of a security an opportunity to shorten the statute of limitation by a rescission offer. There is no comparable provision under the present Mississippi Act.

Section 7 — This is a copy of section 410 (f) of the Uniform Securities Act.

Section 8 — This is a copy of section 410(g) of the Uniform Securities Act.

Section 9 — This would replace section 5371 of the present Mississippi Act which allows actions against the bond posted under section 5365. However, under this proposed provision the purchaser would not be limited as he is under section 5371 to the amount of the bond which has been posted.

Section 10 — This would merely repeal the two existing civil liability provisions under the Mississippi Blue Sky Law.

WRONGFUL DEATH[1] DAMAGES IN MISSISSIPPI

Semmes Luckett and Stephen L. Thomas***

Although the Supreme Court of Mississippi has stated that there is no mathematical formula for measuring damages in a wrongful death action,[2] every lawyer who represents a litigant in such a case is immediately confronted with the task of arriving at a figure representative of the net value of the decedent's life. Economists and statisticians, employing their charts and statistics for determining damages resulting from loss of earning power, are relied on in many cases. To properly utilize their services or subject their conclusions to a proper analysis through cross examination, it is essential that the attorney know the components of the formula which economists use in arriving at their conclusion.

This article will hopefully aid attorneys in their efforts to arrive at a representative figure. The areas to be explored in computing the the value of a wrongful death claim include the following questions: In computing the net value of the decedent's life expectancy should the computations be based on the deceased's life expectancy or on his work expectancy? Should the deceased's earnings at the time of his death or his prospective earnings be used? Should decedent's personal living expenses be deducted? What damages other than lost earnings may be recovered? What rate of discount should be used to reduce the total award to its present value?

I. HISTORICAL DEVELOPMENT

The original wrongful death statute was Lord Campbell's Act[3] passed by Parliament in 1846 to rectify the mischief caused by Lord Ellenborough's holding in the 1808 case of *Baker v. Bolton*[4] that in a civil court the death of a human being could not be complained of as an injury.[5] The act created a cause of action for the benefit of the immediate family of a decedent whose death was caused by the wrongful act, neglect, or default of another. The recovery was limited to the named beneficiaries[6] and divided among them as the jury by their verdict might direct, with damages measured by the loss suffered by those beneficiaries. Today every state has a wrongful death statute.[7]

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[1] MISS. CODE ANN. § 1453 (1956).

[2] Catholic Diocese of Natchez—Jackson v. Jacquith, 224 So. 2d 216 (Miss. 1969); Boyd Constr. Co. v. Bilbro, 210 So. 2d 267 (Miss. 1968); Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 173 So. 2d 433 (1965).

[3] The Fatal Accident Act, 9 & 10 Vict., c. 93 (1846).

[4] 170 Eng. Rep. 1033 (1808).

Mississippi's original wrongful death statute[8] was similar to Lord Campbell's Act. It created a cause of action for a death caused by the wrongful or negligent act or omission of another, if the decedent left "a widow or children, or both, or husband, or father."[9] It directed that damages for the death of a father who was survived by a widow and children be distributed as the personal property of the decedent.[10] The statute provided for "such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing."[11]

The statute was materially changed in 1896[12] when the measure of damages allowed was amended to read:

> In such action the party or parties suing shall recover such damages as the jury may assess, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.[13]

Thus the statute was changed from the typical Lord Campbell's to an expanded type of statute under which damages for both the fatal injury and the death itself might be recovered in a single action.[14]

Since the adoption of chapter 86 of the Laws of 1896, Mississippi's wrongful death statute has given the beneficiaries[15] thereunder the right to recover "all the damages of every kind." In the cases which followed shortly after the 1896 alteration, the Mississippi Supreme Court held that the beneficiaries could recover the present value of the decedent's own life expectancy.[16] This position was repudiated in the 1924 case of *Belzoni Hardwood Co. v. Cinquimani*[17] when the court stated that the present net value of the decedent's life expectancy was not recoverable as an element of damages in wrongful death actions.[18] The court adhered to this view[19] until the 1949 case of *Gordon v. Lee*[20] where the pre-*Cinquimani* rule was restored, *i.e.*, that the parties suing for the death of the deceased could recover the net value of his life. The proposition that the right to recover "damages of every kind to the decedent" includes the right to recover the present net value of the life expectancy of the deceased has not been questioned since 1955,[21] and is now a well established rule in this state.[22]

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[5] *Id.*

[6] The beneficiaries were the wife, husband, child, and parents of the decedent.

[7] S. SPEISER, RECOVERY FOR WRONGFUL DEATH, app. A, 733-904 (1966) [hereinafter cited as SPEISER].

[8] MISS. CODE, ch. 61, art. 48 (1857).

[9] *Id.*

[10] MISS. CODE ANN. § 470 (1956) provides that such property be divided in equal shares.

[11] MISS. CODE, ch. 61, art. 48 (1857).

[12] Ch. 86, § 1, [1896] Miss. Laws.

[13] *Id.*

[14] The amended statute allowed the beneficiaries to recover the damages of the decedent as well as their own damages.

[15] The beneficiaries under MISS. CODE ANN. § 1453 (1956) are the wife, husband, child, brother, sister, parent, or if none, the personal representative of the decedent.

II. Work Expectancy v. Life Expectancy

The use of life expectancy tables is permitted in Misssissippi unless the decedent had a pre-existing condition that would invalidate their showing.[23] Work expectancy tables, however, are not widely used even though they can be effective from the defendant's point of view in lowering the total award since it is the decedent's future earning capacity that affects the beneficiaries' expectation of support.[24]

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[16] New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104 (1920) ("whatever sum the son might have recovered as the present value of his own expectancy"); Gulf & S.I.R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919) ("the present value of the decedent's own life expectancy"); Mississippi Oil Co. v. Smith, 95 Miss. 528, 48 So. 735 (1909) ("the present value of the life expectancy of the deceased"); Cumberland Tel. & Tel. Co. v. Anderson, 89 Miss. 732, 41 So. 263 (1906) ("whatever sum the son might have recovered as the present value of his own expectancy").

[17] 137 Miss. 72, 102 So. 470 (1924).

[18] *Id.* at 95, 102 So. at 474.

[19] Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); Gulf Ref. Co. v. Miller, 150 Miss. 68, 116 So. 295 (1928); Yazoo & M.V.R.R. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Yazoo & M.V.R.R. v. Barringer, 138 Miss. 296, 103 So. 86 (1925).

[20] 208 Miss. 21, 43 So. 2d 665 (1949).

[21] Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955) (dissenting opinion).

[22] *See, e.g.*, Winstead v. Hall, 251 Miss. 800, 171 So. 2d 354 (1965); Ashcraft v. Alford, 236 Miss. 25, 109 So. 2d 343 (1959); Reed v. Eubanks, 232 Miss. 27, 98 So. 2d 132 (1957); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955); Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1955); Southern Pine Elec. Ass'n v. Denson, 214 Miss. 397, 57 So. 2d 859 (1952).

[23] *See* Mississippi Cent. R.R. v. Robinson, 106 Miss. 896, 64 So. 838 (1941); Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735 (1909); Cumberland Tel. & Tel. Co. v. Anderson, 89 Miss. 732, 41 So. 263 (1906); Vicksburg R.R., Power & Mfg. Co. v. White, 82 Miss. 468, 34 So. 331 (1903); Illinois Cent. R.R. v. Crudup, 63 Miss. 291 (1885).

In Mississippi there has been little express recognition of the distinction between the two expectancies.[25] In *Jeffreys v. Clark*[26] the appellants argued that the award was excessive because it was based on the decedant's life expectancy rather than his work expectancy. The court responded:

> We do not know of any law which requires a man to quit working at the age of sixty-five or seventy, and many men are still working at the age of seventy and beyond. . . . There is no proof in this record that the deceased would have been forced to retire at age sixty-five.[27]

The distinction was inferentially recognized in *Rayborn v. Freeman*[28] wherein the court said:

> Insofar as the first error is concerned [that the award was excessive], the record discloses that appellant had a life expectancy of 10.1 years. The record is wholly silent as to what part of these years he would have been able to continue in his employment.[29]

The above cases seem to indicate that the court, when presented with proper evidence, would consider the difference in determining the propriety of verdicts. The importance becomes apparent when one notes the differences, at various ages, between work and life expectancy.[30]

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[24] SPEISER, *supra* note 7, § 3.14.

[25] Work expectancy is the period of the decedent's life during which he could expect to earn a regular income. Life expectancy is the period of years the average person lives. *See generally* Immel, *Actuarial Tables and Damage Awards,* 19 OHIO ST. L.J. 240 (1958).

[26] 251 Miss. 129, 168 So. 2d 662 (1964).

[27] *Id.* at 146, 168 So. 2d at 669.

[28] 209 So. 2d 193 (Miss. 1968).

[29] *Id.* at 196.

[30] 8 U.S. DEPT. OF LABOR, MANPOWER REPORT 11 (July, 1963) provides the following statistics.

Average Number of Remaining Years of:

Age	*Life*	*Work*
20	49.6	42.6
25	45.0	37.9
30	40.4	33.2
35	35.7	28.6
40	31.2	24.1
45	26.9	19.7

It is not suggested that work expectancy tables should replace life expectancy tables, but they should be used to put life expectancy tables in the proper perspective.[31]

Neither table alone offers the jury the proper information needed to reach an equitable award. Work expectancy tables fail to consider that work in certain fields such as farming, law, or medicine can continue until death. They also fail to recognize that most people will have some income for life even though it may diminish after retirement. Life expectancy tables do not consider the fact that earning capacity generally decreases in a person's later years and that many people are forced to retire at certain ages.

In an attempt to prevent the defendant from convincing the jury that the plaintiff was "holding something back," the plaintiff should offer evidence as to both expectancies and provide the jury with a reasonable projection of income for the decedent's later years.[32] The plaintiff should also remind the jury that the decedent, if forced to retire from the job he held at the time of his death because of age requirements, could have entered a new career.[33]

III. Should the Award Be Based on the Decedent's Wages at the Time of His Death or on His Prospective Earnings?

When the family provider is killed, it is safe to assume in most instances that his financial contributions to his family would have continued in proportion to his earnings.[34] Because the value of one's life expectancy is measured by one's earnings, the question of how those earnings are calculated is important. Should they be based on the decedent's earnings at the time of death or on his prospective earnings? If based on prospective earnings what factors should be considered in such a determination? The answers to these questions are of great importance in valuing the life expectancy of the deceased.

Age	*Life*	*Work*
50	22.8	15.6
55	19.2	11.9
60	15.8	8.5
65	12.8	7.3
70	10.2	6.4
75	8.0	5.1

[31] *See* Immel, *supra* note 25, at 240.

[32] Speiser, *supra* note 7, § 3:14.

[33] *Id.*

[34] *Id.* § 3:15.

The rule generally followed in this country is that the award should be based on the decedent's future earnings.[35] This rule is based upon the fact that damages in a wrongful death case are awarded as a substitute for money which the decedent would have earned in the future had death not intervened.[36] The factors to be considered in determining prospective earning capacity are education,[37] vocation,[38] health,[39] manifestations of a vigorous willingness to work or an indifference toward work,[40] past earnings,[41] and promotions.[42]

In *Gulf and Ship Island Railroad Co. v. Boone*,[43] which involved the excessiveness of a verdict for the wrongful death of a young soldier, the argument was made that it was unjust to compute the value of the deceased's life expectancy on the basis of the wages he was earning at the time of his death and give no consideration to his prospective earnings. The court replied:

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[35] *Id.* § 3:18.

[36] *Id.*

[37] *See* Catholic Diocese of Natchez–Jackson v. Jaquith, 224 So. 2d 216 (Miss. 1969); Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Gulf & S.I.R.R. v. Simmons, 153 Miss. 327, 121 So. 144 (1929).

[38] *See* Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Continental S. Lines v. Klass, 217 Miss. 795, 65 So. 2d 575 (1953); Gulf & S.I.R.R. v. Simmons, 153 Miss. 327, 121 So. 144 (1929).

[39] *See* Marsh v. Johnson, 209 So. 2d 906 (Miss. 1968); Junkins v. Brown, 238 Miss. 142, 117 So. 2d 712 (1960); Continental S. Lines v. Klass, 127 Miss. 795, 65 So. 2d 575 (1953); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951); Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934); Standard Coffee Co. v. Carr, 171 Miss. 714, 157 So. 685 (1934); Illinois Cent. R.R. v. Causey, 106 Miss. 36, 63 So. 336 (1913); Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 48 So. 735 (1909); Mobile, J. & K.R.R. v. Hicks, 91 Miss. 273, 46 So. 360 (1908).

[40] *See* Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 149 So. 2d 340 (1963); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951); Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934); Standard Coffee Co. v. Carr, 171 Miss. 714, 157 So. 685 (1934); Gulf & S.I.R.R. v. Simmons, 153 Miss. 327, 121 So. 144 (1929); Mobile, J. & K.R.R. v. Hicks, 91 Miss. 273, 46 So. 360 (1908).

[41] *See* Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); Marsh v. Johnson, 209 So. 2d 906 (Miss. 1968); Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 149 So. 2d 340 (1963); Junkins v. Brown, 238 Miss. 142, 117 So. 2d 712 (1960); Continental S. Lines v. Klass, 217 Miss. 795, 65 So. 2d 575 (1953); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951); Avent v. Tucker, 188 Miss. 207, 194 So. 596 (1940); Belzoni Hardwood Lumber Co. v. Langford, 127 Miss. 234, 89 So. 919 (1921); Illinois Cent. R.R. v. Causey, 106 Miss. 36, 63 So. 336 (1913).

[42] *See* Petition of Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971); Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 149 So. 2d 340 (1963).

[43] 120 Miss. 632, 82 So. 335 (1919).

> [W]e cannot leave the evidence and speculate as to what trade or profession young Boone would have engaged in when discharged from the army, or as to what he would earn by any future employment.[44]

In several wrongful death cases following *Boone* the court has clearly viewed the adequacy of the award in the light of decedent's earnings at the time of his death.[45] The decedent's earnings at the time of his death have also been considered in a number of recent cases where the court was considering the propriety of an award.[46] It is doubtful, however, that the specific point under consideration was brought to the attention of the court in those cases since the record does not reflect it.

The fact that the deceased had the right to expect his earnings to increase in the future was raised in *Illinois Central Railroad Co. v. Gwin*[47] in an effort to substantiate a sizeable judgment. The court apparently considered this contention. Although the verdict was ruled excessive, the majority opinion noted that the evidence showed the decedent's' annual income was steadily increasing and that it was reasonable to believe that it would continue to do so for years to come.[48] The next year in *Jeffreys v. Clark*[49] the court brushed the question aside with the comment that there was no proof in the record that the decedent could not have increased his earnings.[50]

A reading of the Mississippi cases leads to the conclusion that the question of whether the calculations of the deceased's life expectancy should be based on his earnings at the time of death or on his future earnings has not been squarely met and answered by the court since the early *Boone* case. Despite the holding in that case that the calculations must be based on the deceased's earnings at the time of his death, the court will probably now recognize that the prospective earning capacity of the deceased is an important consideration.[51]

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[44] *Id.* at 659, 82 So. at 338.

[45] Louisville & N.R.R. v. Garnett, 129 Miss. 795, 93 So. 241 (1922); Hines v. Green, 125 Miss. 476, 87 So. 649 (1921).

[46] Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); Marsh v. Johnson, 209 So. 2d 906 (Miss. 1968); Rayborn v. Freeman, 209 So. 2d 193 (Miss. 1968); Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967); Miller Transp., Ltd. v. Espey, 187 So. 2d 876 (Miss. 1966); Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 173 So. 2d 433 (1965); Winstead v. Hall, 251 Miss. 800, 171 So. 2d 354 (1965); Illinois Cent. R.R. v. Nelson, 245 Miss. 395, 146 So. 2d 69 (1962).

[47] 246 Miss. 67, 149 So. 2d 340 (1963).

[48] *Id.* at 72, 149 So. 2d at 341.

[49] 251 Miss. 129, 168 So. 2d 662 (1964).

[50] *Id.* at 146, 168 So. 2d at 669.

[51] The recent cases seem to indicate that the court now considers prospective future earnings although they have never directly mentioned it.

The court should keep in mind that damages in wrongful death actions are awarded as a substitute for the money which the deceased and his family would have received had death not intervened. No evidence could be more relevant to the central issue in wrongful death actions than that pertaining to the probable future earnings of the deceased.[52]

IV. DEDUCTION OF DECEDENT'S PERSONAL EXPENSES

Any discussion in this area must begin with the court's statement in *Illinois Central Railroad Co. v. Sanders:*[53]

> [I]t has been held under a statute similar to our own that living expenses of a decedent are not a deductible item in determining the value of the life expectancy to the decedent. . . . The earning capacity of a man is what he is capable of earning and is not what he is capable of saving.[54]

An examination of *Sanders* will disclose that the court was not referring to the personal consumption expenditures which the decedent would have spent on his own upkeep. Two statements are made by the court. First, the court found "that living expenses of a decedent are not a deductible item in determining the value of the life expectancy to the decedent." This is, to say the least, an ambiguous statement. It can be construed as a reference to the personal living expenses of the decedent or to the living expenses of his family. Secondly, the court stated that "[t]he earning capacity of a man is what he is capable of earning and not what he is capable of saving." This statement was surely made in the context of the decedent's family living expenses, for what one saves is that which is left out of one's earning after he has discharged his family living expenses.

Additional light is thrown on the meaning of the court's statement by an examination of the authority on which it was made — the Connecticut case of *Michel v. New England Coal and Coke Co.*[55] In *Michel* the question was whether the trial court had erred in charging the jury that the amounts the decedent would have spent in support of his family should be deducted in arriving at the net value of decedent's life expectancy. The question of the deductability of the decedent's personal expenditures was not an issue in the case. Hence, *Michel* cannot support any statement under consideration except that the decedent's family living expenses are not deductible. The Connecticut rule is clearly explained in the later case of *Floyd v. Fruit Industries*[56] where the court stated:

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[52] SPEISER, *supra* note 7, § 3:18.

[53] 229 Miss. 139, 90 So. 2d 366 (1956).

[54] *Id.* at 157-58, 90 So. 2d at 373.

[55] 132 Conn. 671, 47 A.2d 187 (1946).

> [T]he probable cost of future living expenses must be deducted from the allowance made as reasonable compensation for the total destruction of his capacity to carry on life's activities.[57]

The Mississippi Supreme Court has indicated in several cases before and after the *Sanders* decision that in determining the value of the deceased's life expectancy, the amount that he would probably have spent for his personal living expenses had he survived should be deducted from decedent's gross earnings.

In *Hines v. Green,*[58] a pre-*Sanders* decision, the court stated that in determining the net value of the decedent's life expectancy the expenses that would have been incurred by the deceased on his own account in living and supporting himself must be deducted.[59] This language was cited with approval in *Louisville & Nashville Railroad Co. v. Garnett*[60] where the court went on to say:

> [T]he measure of recovery [in a wrongful death action] is the *net* present cash value of what the deceased would have earned during his life expectancy, and not the gross amount.[61]

Another pre-*Sanders* case reflective of this view is *New Deemer Manufacturing Co. v. Alexander.*[62] In ruling a jury instruction erroneous, the court commented that the instruction failed to call for a reduction of the gross award by that amount which the deceased would have spent for his own support.[63] In his dissenting opinion in *Cinquimani,*[64] a dissent which now represents the majority view, Judge Etheridge said:

> [T]he value of the [life] expectancy, less the said necessary living expenses, was a recoverable element.[65]

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[56] 144 Conn. 659, 136 A.2d 918 (1957).

[57] *Id.,* 136 A.2d at 926.

[58] 125 Miss. 476, 87 So. 649 (1921).

[59] *Id.* at 498, 87 So. at 653.

[60] 129 Miss. 795, 93 So. 241 (1922).

[61] *Id.* at 808, 93 So. at 243 (emphasis added).

[62] 122 Miss. 859, 85 So. 104 (1920).

[63] *Id.* at 896, 85 So. at 107.

[64] 137 Miss. 72, 102 So. 470 (1924).

[65] *Id.* at 99, 102 So. at 475.

Several post-*Sanders* cases[66] have followed the net cash value formula. It is only logical that the word *net* would not appear in the formula if no deduction of the decedent's personal living expenses was to be made.

In *Ashcraft v. Alford*[67] the court approved a jury instruction which read "you may consider the present net cash value of the life of the deceased."[68] The case of *Jeffreys v. Clark*[69] supports the proposition that the decedent's personal living expenses should be deducted. In that case the court defined the damages due the beneficiaries as "any pecuniary advantage . . . which the interested parties had a reasonable expectation of deriving from the decedent had he continued to live."[70] This language seems to clearly dictate the deduction of the decedent's personal living expenses as they are not a "pecuniary advantage" which the beneficiaries had a "reasonable expectation" of receiving.

The general rule followed in American jurisdictions is that the decedent's personal living expenses, those expenses necessary to maintain health and well being such as food, clothing, and shelter, should be deducted from the decedent's gross earnings in determining the value of his life expectancy.[71]

V. OTHER DAMAGES

A. Pain and Suffering

Damages for pain and suffering of the decedent can be recovered in a wrongful death action if the plaintiff can establish that death was not instantaneous and that the decedent did in fact endure some conscious pain.[72] It need only be established that the deceased was conscious and in pain for a brief period to present this issue to the jury. In *Boyd Construction Co. v. Bilbro*[73] the evidence as to pain and suffering showed only that before death the decedent cried out, "oh, me!" and the court stated:

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[66] *E.g.*, Jeffreys v. Clark, 251 Miss. 129, 168 So. 2d 662 (1964); Ashcraft v. Alford, 236 Miss. 25, 109 So. 2d 343 (1959); Reed v. Eubanks, 232 Miss. 27, 98 So. 2d 132 (1957).

[67] 236 Miss. 25, 109 So. 2d 343 (1959).

[68] *Id.* at 30, 109 So. 2d at 344.

[69] 251 Miss. 129, 168 So. 2d 662 (1964).

[70] *Id.* at 147, 168 So. 2d at 670.

[71] 22 AM. JUR. 2d *Death* § 153 (1965).

[72] Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); Catholic Diocese of Natchez–Jackson v. Jaquith, 224 So. 2d 216 (Miss. 1969); Boyd Constr. Co. v. Bilbro, 210 So. 2d 637 (Miss. 1968); Marsh v. Johnson, 209 So. 2d 906 (Miss. 1968); New Orleans & N.E.R.R. v. Shows, 240 Miss. 604, 128 So. 2d 381 (1961); Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954); Louisville & N.R.R. v. Whisenant, 214 Miss. 421, 58 So. 2d 908 (1952); Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665 (1949); Murry Chevrolet Co. v. Cotten, 169 Miss. 521, 152 So. 657 (1934); Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470 (1924); Yazoo & M.V.R.R. v. Mullins, 115 Miss. 343, 76 So. 147 (1917).

> She was therefore not killed instantly, and the jury had a right to value, as it saw fit, the pain which she did experience for such length of time as she remained conscious.[74]

However, if it cannot be established that the decedent regained consciousness before death, no damages for pain and suffering will be allowed.[75] The mental anguish of the decedent's family is not recoverable in a wrongful death action.[76]

B. Loss of Society, Companionship, and Services

Although in the early development of wrongful death damages in Mississippi no recovery was allowed for loss of society, companionship or services,[77] today they are recoverable damages to the beneficiaries.[78]

In *Standard Coffee Co. v. Carr*,[79] the court approved the following instruction:

> [Y]ou have a right to consider on the proof the present money value of any loss of any services and companionship, conjugal and otherwise, that the husband would likely have enjoyed . . .

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[73] 210 So. 2d 637 (Miss. 1968).

[74] *Id.* at 640.

[75] Coleman v. Teague, 228 So. 2d 869 (Miss. 1969); Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 149 So. 2d 340 (1963); Moore v. Johnson, 148 Miss 827, 114 So. 734 (1927); Gulf & S.I.R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919); Illinois Cent. R.R. v. Fuller, 106 Miss. 65, 63 So. 265 (1913).

[76] St. Louis & S.F.R.R. v. Moore, 101 Miss. 768, 58 So. 471 (1912).

[77] Mobile & Ohio R.R. v. Watly, 69 Miss. 145, 13 So. 825 (1891).

[78] Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); Boyd Constr. Co. v. Bilbro, 210 So. 2d 637 (Miss. 1968); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Gulf, M. & O.R.R. v. White, 219 Miss. 342, 68 So. 2d 458 (1954); Louisville & N.R.R. v. Whisenant, 214 Miss. 421, 58 So. 2d 908 (1952); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951); Standard Coffee Co. v. Carr, 171 Miss. 714, 157 So. 685 (1934); Murry Chevrolet Co. v. Cotton, 169 Miss. 521, 152 So. 657 (1934); B. Kullman & Co. v. Sammuels, 148 Miss. 871, 114 So. 807 (1927); Jackson v. Port Gibson, 146 Miss. 696, 111 So. 828 (1927); Gulf & S.I.R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919); St. Louis & S.F.R.R. v. Moore, 101 Miss. 768, 58 So. 471 (1912); *see* Comment, *Damages Under the Mississippi Wrongful Death Statute*, 13 Miss. L. J. 571 (1941).

[79] 171 Miss. 714, 157 So. 685 (1934).

> the loss of any care and moral training to the children . . . during such minority.[80]

The relationship between the decedent and the beneficiaries becomes important in this area of wrongful death damages. The amount awarded for this loss can be greatly increased or diminished by evidence establishing a close or distant family relationship. Evidence showing the remarriage of the decedent's spouse is admissible to show lack of "loss" in the society-companionship area of damages.[81]

C. *Medical Expenses*

The medical expenses incurred by the deceased are also recoverable under a wrongful death action.[82] The terms of the Mississippi wrongful death statute clearly indicate that medical expenses are recoverable in that they would be recoverable as damages in an action by the decedent had he survived.[83] In fact, Speiser in his book on wrongful death recovery[84] states that in Mississippi medical expenses of the deceased are recoverable by the terms of the statute itself.[85] The propriety of such recovery in wrongful death cases is evidenced by the fact that no appeal has ever been made from their inclusion in an award. The court's mention of medical expenses has been limited to a casual inclusion thereof while passing on the adequacy or inadequacy of verdicts. In so doing, the court has included not only hospital and doctor bills but ambulance charges as well.[86]

D. *Funeral Expenses*

The courts are divided on the question of whether or not funeral expenses may be recovered as an element of damages in a wrongful death action.[87]

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[80] *Id.* at 724, 157 So. at 688. *But see* Anderson v. Eagle Motor Line, 423 F.2d 81 (5th Cir. 1970) (denying damages for loss of consortium).

[81] Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967).

[82] Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); New Orleans & N.E.R.R. v. Thornton, 191 So. 2d 547 (Miss. 1966); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955).

[83] MISS. CODE ANN. § 1453 (Supp. 1971) states in part that the beneficiaries may recover the damages the decedent would have been entitled to had death not intervened.

[84] *See* SPEISER, *supra* note 7.

[85] *Id.* § 3:47.

[86] Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956).

[87] SPEISER, *supra* note 7, § 3:49.

Speiser lists Mississippi as among those states which allow recovery in wrongful death actions,[88] citing *Illinois Central Railroad Co. v. Crudup.*[89] However, an examination of that case will show that it is not authority for such a proposition as it was decided under Tennessee law.[90] *American Jurisprudence Second* also lists Mississippi as a state in which funeral expenses are recoverable, but again the case relied on, *Illinois Central Railroad Co. v. Perkins,*[91] was decided under Tennessee law.[92]

There are several Mississippi cases in which the court, when passing on the adequacy or inadequacy of a wrongful death verdict, mentioned the deceased's funeral expenses as a factor to be considered in making its decision.[93] In *Junkins v. Brown*[94] the court overruled an objection to the use of a chart which included among other items the decedent's funeral expenses. It does not, however, appear that in the above mentioned cases the court was called upon specifically to decide whether the deceased's funeral expenses were recoverable.

In the 1972 case of *Scott v. K-B Photo Services,*[95] the court was squarely presented with the question of the recoverability of funeral expenses in wrongful death actions. The court's response was that, except perhaps when the action was for the wrongful death of a minor,[96] funeral expenses could not be recovered.[97]

E. Punitive Damages

Although unrecoverable under the original Lord Campbell's Act,[98] today punitive damages are recoverable in wrongful death actions under certain circumstances.[99] The court stated in *West v. Williams*[100] that punitive damages are a proper element of recovery when the defendent's conduct reflects "the willful and wanton disregard for human life."[101] The defendant's conduct need not be intentional as the court pointed out in *Illinois Central Railroad Co. v. Fuller*,[102] wherein it commented that punitive damages are called for when the defendant's act evidences "malice, gross negligence, or wantonness, or willful disregard."[103] Although the court has been restrictive in allowing punitive damages, if allowed, such damages can greatly increase an award.[104] Attorneys representing defendants in wrongful death claims should always request a jury instruction denying punitive damages because refusal of such an instruction, in the absence of acts making such damages proper, is reversible error.[105]

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[88] *Id.* § 3:49 n.2.

[89] 63 Miss. 291 (1885).

[90] *Id.* at 298.

[91] 223 Miss. 891, 79 So. 2d 459 (1955).

[92] *Id.* at 906, 79 So. 2d at 463.

[93] Burlingame v. Southwest Drug Stores, 203 So. 2d 74 (Miss. 1967); Miller Transp., Ltd. v. Espey, 187 So. 2d 876 (Miss. 1966); Winstead v. Hall, 251 Miss. 800, 171 So. 2d 354 (1965); American Hosp. & Life Ins. Co. v. Runnels, 240 Miss. 685, 128 So. 2d 383 (1961).

[94] 238 Miss. 142, 117 So. 2d 712 (1960).

[95] 260 So. 2d 842 (Miss. 1972).

[96] This was done in Natchez, J. & C.R.R. v. Cook, 63 Miss. 38 (1885).

[97] 260 So. 2d 842, 844 (Miss. 1972).

[98] Illinois Cent. R.R. v. Fuller, 106 Miss. 65, 76, 63 So. 264, 267 (1913).

VI. REDUCTION OF DAMAGES TO PRESENT WORTH

After ascertaining the amount of loss suffered by the plaintiff the jury must next determine what amount of money awarded *now* will compensate for that loss, taking into consideration that the money can be easily and safely invested and earn interest at some set annual rate.[106]

The items which should be discounted to present worth are those which represent damages reasonably certain to arise *in the future* by reason of the decedent's death. These losses are prospective, and the plaintiff is in effect being prepaid for them. The damages awarded for loss of future services and support should therefore be discounted, while those awarded for medical expenses, loss of society and companionship, the decedent's pain and suffering, lost earnings to the date of trial, and punitive damages should not be discounted as they represent losses already realized.[107]

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[99] West v. Williams, 245 So. 2d 591 (Miss. 1971); Boyd Constr. Co. v. Bilbro, 210 So. 2d 637 (Miss. 1968); Morris v. Huff, 238 Miss. 111, 117 So. 2d 800 (1960); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955); Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954); Belk v. Rosamond, 213 Miss. 633, 57 So. 2d 461 (1952); Illinois Cent. R.R. v. Fuller, 106 Miss. 65, 63 So. 265 (1913).

[100] 245 So. 2d 591 (Miss. 1971).

[101] *Id.* at 593.

[102] 106 Miss. 65, 63 So. 265 (1913).

[103] *Id.* at 79, 63 So. at 268.

[104] *Cf.* Tri-State Transit Co. v. Worley, 197 Miss. 663, 20 So. 2d 477 (1945) (allowing punitive damages in amount double to actual damages).

[105] Boyd Constr. Co. v. Bilbro, 210 So. 2d 637 (Miss. 1968).

[106] This is the "discounting" process.

[107] *See* SPEISER, *supra* note 7, § 8:1.

There is little room for argument over which elements of damages should be discounted, but the question of what discount rate should be used is not so settled. In Mississippi the rate of interest which a plaintiff might reasonably be expected to receive from an investment of his award, and which therefore should be used in reducing those damages to the present worth, is a question of fact for the jury.[108] The defendant should request an instruction to the jury charging them to apply as the discount rate that rate of interest which is reasonable and just, taking into consideration the proof presented[109] and their knowledge of the prevailing interest rates on safe, secure investments. The plaintiff should instruct the jury that they may take inflation into consideration when arriving at their verdict.[110] This can greatly reduce the effect of the discount rate. The court stated in *St. Louis & San Francisco Railway v. Dyson*:[111]

> [W]e do not feel that the verdict is beyond the bounds of reason, particularly when consideration is given to the decreased purchasing power of the dollar.[112]

In the absence of evidence as to what discount rate is reasonable then the legal rate of interest (6 percent per annum in Mississippi)[113] may be used. This was done in *Hines v. Green*[114] where the court stated:

> [F]inding the present value by dividing the total expectancy... by one plus six percent . . . which in the absence of other proof we will apply in this case.[115]

The court commented in *Louisville & Nashville Railroad Co. v Garnett*[116] that the total expectancy should be discounted at 6 percent, "the prevailing noncontract rate."[117]

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[108] This accounts for the wide variety of discount rates used in Misssissippi; *see* cases cited note 118 *infra*.

[109] The proof from the defense standpoint should consist of the rate of interest a safe investment can earn.

[110] *Cf.* St. Louis & S.F. Ry. v. Dyson, 207 Miss. 639, 43 So. 2d 95 (1949) (personal injury case); Laurel Light & Ry. v. Jones, 137 Miss. 143, 102 So. 1 (1924) (personal injury case). *See generally* 48 COLUM. L. REV. 264 (1948).

[111] 207 Miss. 639, 43 So. 2d 95 (1949).

[112] *Id.* at 657, 658, 43 So. 2d at 99.

[113] MISS. CODE ANN. § 39 (1956).

[114] 125 Miss. 476, 87 So. 649 (1921).

[115] *Id.* at 498, 87 So. at 653.

[116] 129 Miss. 795, 93 So. 241 (1922).

[117] *Id.* at 806, 93 So. at 243.

Cases can be found in which the court has approved a variety of discount rates.[118] It is quite possible, with money earning the return it does today, that the defendant could justifiably argue for a discount rate of 7 percent per annum.[119] However, the plaintiff, by using the rate of inflation today, could offset this by 4 or 5 percent per annum.[120]

In any event, the discount rate which is used is of great import to the litigants. To illustrate, assume that a decedent had a life expectancy of twenty years and that he contributed $10,000 per year to the support of his family. The gross amount in damages from loss of support is $200,000. If this amount were discounted at 3 percent per annum the net loss would be $148,774; at 4 percent per annum the net loss is $135,903; at 5 percent per annum the net loss is $124,662; at 6 percent per annum the net loss is $114,700; and at 7 percent per annum the net loss is only $105,940. From examining these figures it becomes readily apparent that from the defendant's standpoint it is important to establish as high a discount rate as possible for every dollar judiciously invested. The defendant should take great pains to explain the theory behind discounting an award to the jury because it often appears to be "unfair" to the average juror. The easiest way to do this is to get the jury to think of the plaintiff's loss in terms of a certain number of annual losses instead of one large loss. Their job is to award an amount that will yield the annual loss to the plaintiffs for the period of the decedent's expectancy. The defendant should then show that, using the figures above, an award of $114,700 at 6 percent per annum will yield to the beneficiaries $10,000 a year for twenty years, and that by awarding the plaintiffs $200,000 they are over compensating them. The amount that can be accumulated over an extended period of years by investing at a high rate of compound interest is so surprisingly large that the average juror will be shocked into the realization that it requires a much smaller sum than he would ordinarily believe to provide the decedent's family with an income comparable to that which they enjoyed before the death of the decedent.

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[118] *See* Petition of Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971) (4 percent); Bush Constr. Co. v. Walters, 250 Miss. 384, 164 So. 2d 900 (1964) (6 percent); Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 149 So. 2d 340 (1963) (5 percent).

[119] An interview with North Mississippi Savings and Loan in Oxford, Mississippi, revealed that for a large investment ($100,000) for an extended period of deposit, a rate of 7 percent per annum or more is normal.

[120] *See* SEC. OF TREAS., STATE OF FINANCES xvii (1971).

VII. Conclusion

The court's statement that there is no mathematical formula for measuring damages in wrongful death cases should be read in the light of Judge Roger's comment in *Illinois Central Railroad Co. v. Gwin*:[121]

> [T]his Court must never forget, nor lose sight of, the ancient judicial guidepost on which is written the Latin maxim: "Corpus humanum non recipit aestimationem," and which means a human body is not susceptible of appraisement.[122]

Viewed in that light the statement is understandable and true.

The fact remains that every wrongful death case presents the problem of relating a cash award equitably to the losses occasioned by the death of the decedent. Such a problem can be solved only if an accurate measure of the economic losses due to the death can be developed. It is true, however, that because of the difficulty in placing a monetary value on human life, the jury will not be completely bound by such a formula in estimating the amount of damages and will have wide latitude to exercise its sound judgment and good sense.[123]

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[121] 246 Miss. 67, 149 So. 2d 340 (1963).

[122] *Id.* at 76, 77, 149 So. 2d at 344.

[123] Catholic Diocese of Natchez–Jackson v. Jaquith, 224 So. 2d 216 (Miss. 1969); Illinois Cent. R.R. v. Nelson, 245 Miss. 395, 146 So. 2d 69 (1962); McDonald v. Moore, 159 Miss. 326, 131 So. 824 (1931).

CONGLOMERATE MERGERS: A NEGLECTED ASPECT

Thomas Page Sharp and Douglas Stutsman***

The conglomerate merger has become the *cause célèbre* of the antitrust writers both in law journals[1] and lay magazines.[2] Perhaps because of the curbs on the more traditional horizontal and vertical mergers, or perhaps because of the economic advantages, real or supposed, to be derived from the economic relationship, conglomerate mergers have accelerated greatly in the last few years.[3] In spite of all the attention given to the conglomerate merger, virtually all the theory has been concerned with various effects on the market in which the acquired firm operates, while the economic effect in the market of the acquiring firm has been ignored. This is true not only for the journal articles, but more importantly, this has been the focus of the courts.

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[1] *See, e.g.,* Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act,* 68 COLUM. L. REV. 1231 (1968); Hinnegan, *Potential Reciprocity and Conglomerate Merger: Consolidated Foods Revisited,* 17 BUFFALO L. REV. 631 (1968); Means, *Conglomerates and Concentration,* 25 MIAMI L. REV. 1 (1970); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313 (1965); Comment, *Arguing the Guidelines For Conglomerate Mergers,* 5 CAL. W. L. REV. 101 (1968); Note, *Conglomerates and Section 7: Is Size Enough?,* 70 COLUM. L. REV. 337 (1970).

[2] *See, e.g., Coping With the Conglomerates,* AMERICA, June 14, 1969, at 682; *Economy May Be In Danger,* U.S. NEWS AND WORLD REPORT, June 16, 1969, at 10; *How To Regulate the Conglomerates,* BUSINESS WEEK, June 14, 1969, at 148; *Target: Conglomerates,* NEWSWEEK, April 7, 1969, at 59.

[3] Commissioner Reilly commented on this acceleration:

> Recently I had cause to state that "to continue to emphasize action against horizontal mergers would be like mounting a vast hunting expedition for stalking the dinosaur." In the six year period, 1960-65, large horizontal mergers declined not only proportionately, but also in absolute number. However, during the same interval, conglomerate mergers increased from 17 percent to 71 percent of the total of all large mergers. (Remarks of Commissioner John R. Reilly on "Myths and Merger Policy," Antitrust Section of the District of Columbia Bar Association, in Washington, D.C., Feb. 23, 1967).

The focus of the Federal Trade Commission in the *Proctor and Gamble* case,[4] where the FTC sought to enjoin a merger between the largest manufacturer of soap and the largest manufacturer of liquid bleach, was distinctly on the market that was being entered. Commissioner Elman, setting the theoretical stage for the analysis of the merger, stated:

> For present purposes, the most significant market structure variable after concentration is the condition of entry into the market by new competitors. No firm will contemplate entry into a new market unless it feels reasonably sure of being able to obtain a satisfactory market share.[5]

The relevant line of commerce was then defined as the market for liquid bleach and the analysis focused on that market. The strength of Proctor was examined, but only to ascertain some probability that this economic strength would be used to give Clorox a competitive edge. The order of divestiture was appropriate to free the market for bleach from this potentiality and no further analysis was made, or needed, as to the effect of the divestiture on Proctor.

The Supreme Court classified the merger as a product-extension merger and affirmed the decision of the Commission.[6] The Court placed emphasis upon the fact that the entered market was oligopolistic and that the acquisition eliminated the potential competition of the entering firm.

This focus on the entered market is by no means at the expense of inquiry into the strength of the acquiring firm. However, the ultimate determination about the strength of the acquiring firm will depend on whether or not the courts think that the firm will utilize the strength for the purposes of monopolization of the market *vis-a-vis* the acquired firm.

In the *Consolidated Foods* case[7] attention was focused on the market for dried onion and garlic products, the market of Gentry, the acquired firm, and the only consideration given to Consolidated Foods was its power and ability to enforce a policy of reciprocity with the concomitant effect of a lessening of competition.

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[4] Proctor & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,558 (FTC 1963).

[5] *Id.* at 21,570.

[6] Federal Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568 (1967).

[7] Federal Trade Comm'n v. Consolidated Foods Corp., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,182, at 20,973 (FTC 1962). The Court of Appeals for the Seventh Circuit refused to enforce the order of the Commission. 329 F.2d 623 (7th Cir. 1964). This decision was then reversed by the United States Supreme Court. 380 U.S. 592 (1965).

In *Ekco Products Co. v. Federal Trade Commission*[8] the Commission examined the strength of the acquiring company when it acquired a firm that enjoyed a virtual monopoly in a related field. The case was unusual in that the power of the acquiring firm was examined, not to explore the possibility of monopolization in the acquired firm's market, a situation already existing, but in the light of the perpetuation of the monopoly condition. While this position is to be lauded, the focus is still limited to the market of the acquired firm.

This focus on the market of the acquired firm has also been the policy for guidelines of the Federal Trade Commission,[9] the Justice Department,[10] and most recently of two Presidential Task Forces.[11] This

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[8] 347 F.2d 745 (7th Cir. 1965).

[9] The Federal Trade Commission has developed guidelines for various types of industries through its cases. Thus the guidelines for the dairy products industry were developed in In the Matter of Beatrice Foods Company, Docket No. 6653, Opinion of the Commissioner (April 26, 1965). In that case the Commission indicated that it would view with suspicion a merger of an industry giant with a not insubstantial dairy company, and mergers of "medium-sized" dairy companies, or an acquisition program by a "medium-size" company. Similar guidelines have been announced for food distribution, automotive tires, and the cement industry. *See generally* Keyes, *Guidelines Under Section 7 of the Clayton Act,* 1 ANTITRUST L. AND ECONOMICS REV. 79, 81 (1967).

[10] The Department of Justice guidelines for conglomerate mergers as to potential entrants states that it will "ordinarily challenge any merger between one of the most likely entrants into the market and: (i) any firm with approximately 25% or more of the market; (ii) one of the two largest firms in a market in which the shares of the two largest firms amounts to approximately 50% or more; (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or (iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm." U.S. DEP'T OF JUSTICE, MERGER GUIDELINES ¶ 18 (1968).

Where there is danger of reciprocal dealing the Department will challenge the merger because it believes "that a significant danger of reciprocal buying is present whenever approximately 15% or more of the total purchases in a market in which one of the merging firms ('the selling firm') sells are accounted for by firms which also make substantial sales in markets where the other merging firm ('the buying firm') is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm." In addition, the Department will "ordinarily challenge (i) any merger undertaken for the purpose of facilitating the creation of reciprocal buying arrangements, and (ii) any merger creating the possibility of any substantial reciprocal buying where one (or both) of the merging firms has within the recent past, or the merged form has after consummation of the merger, actually engaged in reciprocal buying, or attempted directly or indirectly concern with one market is the result of a failure on the part of the various courts and agencies to find an economic relationship (other than ownership) sufficient to warrant a focus on the market of the acquiring firm. For a while the Justice Department did not challenge pure conglomerate mergers[12] and two recent challenges have been unsuccessful

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to induce firms with which it deals to engage in reciprocal buying, in the produce markets in which the possibility of reciprocal buying has been created." *Id* at ¶ 19.

And as to conglomerate mergers which do not fit the above categories, the Department will scrutinize mergers "where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market." *Id.* at ¶ 22.

[11] U.S. DEP'T OF JUSTICE, TASK FORCE ON ANTITRUST POLICY (1969):
Appendix B. *Merger Act*
Section 1. Prohibited Acquisitions.

(a) No large firm shall directly or indirectly merge with, combine with, or acquire any equity security in any leading firm or directly or indirectly acquire all or substantially all the assets used by a leading firm in any market in which it is a leading firm.

(b) No leading firm shall directly or indirectly merge with, combine with, or acquire any equity security in any large firm or directly or indirectly acquire all the assets of a large firm or a part thereof sufficient to constitute a large firm.

(c) This section shall not apply to firms acquiring any equity security solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, control of firms in which any equity security is acquired. Nor shall anything contained in this section prevent firms from causing the formation of subsidiary firms for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary firms.

(d) If any acquisition is approved by any federal agency, commission, board or other body, such approval shall result in total or qualified exemption of such acquisition from this Act to the same extent such approval results in exemption from section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended. [President Johnson's Task Force].

The most recent task force on anti-trust policy offered no guidelines on conglomerate merger but came forth with a recommendation that the Justice Department minimize its activities in this area. [President Nixon's Task Force]. TRADE REG. REP. ¶ 50,108, at 55,135, 55,136 (1972).

[12] Reilly, *The Conglomerate Merger: A Need for Clarity,* 29 OHIO ST. L.J. 290, 309 states that "the government has yet to challenge publicly an acquisition in which there was no economic relationship existing between the acquiring and acquired firms."

thus far.[13] Without an acceptable theory of economic harm done, the strategies of those who institute suits are likely to continue in failing to challenge the purely conglomerate merger.

The purpose of this article is not to quarrel with the approach of the Commission and the Justice Department, so far as it goes. Indeed, it may be agreed at the outset that the most important grounds for attacking conglomerate mergers are those relied on by these agencies, *i.e.*, reciprocity,[14] elimination of potential competition,[15] and the exercise of the power of huge financial resources[16] as they affect the market of the acquired firm.

Nevertheless, there is an aspect of these mergers that has been neglected and will continue to be neglected so long as the Justice Department, the Commission, and the courts continue to view the problem from such a narrow perspective. Conglomerate mergers individually, and in the aggregate, affect the economy in a manner which cannot be observed when attention is limited to effects on the markets of acquired firms. Such mergers have the effect of further distorting the allocation of resources. They strengthen and entrench existing monopoly power and thereby make the economy even less responsive to consumer demands and desires.

While economists may disagree on many matters concerning both theory and policy, there is virtually unanimous agreement on the nature of the monopoly problem. Monopoly power is undesirable because it distorts the pattern of production away from the wants and needs of consumers; or, to view the matter from the other direction, competition is desirable because it results in the production of those goods and services most wanted by consumers. A clear and typical statement of the problem is given by Professor Clair Wilcox:

> Monopoly prevents the allocation of resources in accordance with the pattern of consumer choice. The monopolist is likely to increase his profit by raising his price. He will then limit his output to the quantity that the market will take at the price that he has fixed. Consumers who would be willing to purchase larger quantities of his product at a lower price are left, instead, to buy goods that are wanted less. Resources are thus

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[13] United States v. International Tel. & Tel. Co., 324 F. Supp. 19 (D. Conn. 1969), *appeal dismissed,* 92 S. Ct. 20 (1972); United States v. Northwest Ind., 301 F. Supp. 1066 (N.D. Ill. 1969).

[14] Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965).

[15] Federal Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568 (1961).

[16] Power of the merging company is always considered, but only as to the potential effect in the structure of the market of the merged firm. *See* notes 9 & 10 *supra.*

> diverted from those things which the community prefers to those which are, at best, a second choice.[17]

In other words, in an economy having a mixture of competitive industries and monopoly (oligopoly) industries, resources are directed so as to produce too little output in the monopoly industries and too much output in the competitive industries.

The purpose of this article is to describe the economic harm that flows from some pure conglomerate mergers and to examine pertinent decisions of the FTC and the courts to ascertain if legal action could successfully be applied to curtail this economic relationship. The authors of this article contend that the present trend toward more conglomerate mergers will further distort the pattern of production, for the effect of such mergers is to divert resources away from monopoly industries into competitive industries.

No one would contend that Congress always seeks a solution to social problems which is consistent with accepted economic theory, and little could be said that would add to the ongoing debate[18] as to whether Congress was interested primarily in an economic solution when it passed the Sherman[19] and Clayton[20] Acts or whether it was primarily interested in the preservation of small business. The policy proposed in this article would have the effect of preserving small business and the more important effect of improving the pattern of resource allocation.

When substantial monopoly profits continue over a period of time, as during periods of continuing prosperity such as we are now experiencing, the volume of retained earnings and working capital increases, and corporate decision makers must find outlets for these funds. They must find investment outlets for the continuing inflow of profit. The funds may be kept in the form of cash and marketable securities, and some increase in such assets would normally occur during such periods. This use of funds, however, has neither the advantage of increasing the current income of stockholders nor that of increasing the future sales revenue of the corporation. The funds may be used to pay out increased dividends, and normally dividend payments would increase during periods of continuing prosperity. But this use has limited attractiveness to corporate managers. While it may increase the satisfaction of stockholders, it reduces the net worth of the corporation, and it does not lead to increased revenue.[21]

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[17] C. Wilcox, Public Policies Toward Business 12 (rev. ed. 1960).

[18] *See, e.g.*, Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 Colum. L. Rev. 422 (1965); Bork & Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363 (1965); Note, *Conglomerates and Section 7, Is Size Enough?*, *supra* note 1.

[19] 15 U.S.C. §§ 1-7 (1970).

[20] 15 U.S.C. §§ 12-27 (1970).

Another important use for corporate profit is reinvestment in plant and equipment. The profits of the firm may be used to expand the productive capacity of the firm. This use of funds is especially desirable from the standpoint of the consumer and the economy as a whole, for it results in a larger output and a lower price in the monopolized area than would exist in the absence of the expansion. In other words, to the extent that profits are used to expand output in the profit-making line, the consumer and the economy will benefit, for such expansion lessens the distortion of the pattern of resource allocation, thus making the pattern of production in the economy more responsive to consumer tastes and preferences. Furthermore, this outlet for profits has a distinct advantage from the standpoint of the corporate decision-maker. Such expansion will increase the amount (both in the dollar and the physical sense) of real assets held by the corporation, and more importantly, it will lead to increased sales revenue.

Professor William J. Baumol has made a study which indicates that decision-makers are more concerned with maximizing sales revenue than with maximizing profit.[22] One motivation for this concern may be that executive incomes are determined primarily by the level of sales revenue rather than by the level of profit.[23] It may be added that the size of the corporation and the prestige that accompanies size will be measured by the volume of revenue rather than by the margin of profit.

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[21] One could not share much empathy with the shareholding class if all that would be suffered by this class would be a lack of present cash with the concomitant benefit of having the funds retained in the capital structure of the corporation and adding to the earnings per share. Unfortunately the social ramifications are deeper. By unilaterally determining that a certain amount and no more is all that will be paid to the shareholder group, the management has made a decision as to allocation of resources that is likely to prove less desirable from an aggregate viewpoint than would be the individual decision of the shareholders who would attempt to place their funds (dividends) where the return would be larger. Presumably a larger return to shareholders would be paid by those companies who most need the capital. Firms who go into the market to attract capital are likely expanding output in less than competitive markets and this result is, of course, beneficial to the economy.

[22] W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH (rev. ed. 1967).

[23] Managerial salaries tend to be correlated with company sales more closely than with profits. McGuire, Chin & Elbing, *Executive Incomes, Sales, and Profits,* 52 AM. ECON. REV. 753, 756, 782 (1962). One study found almost no relationship between profit and executive compensation but found a high degree of correlation with sales and salaries. Roberts, *A General Theory of Executive Compensation Based on Statistically Tested Proportions,* 70 QUAR. J. ECON. 270 (1956). *See also* BUSINESS WEEK, Sept. 17, 1966, at 44-45.

Except in the extreme case where all of a firm's cost is fixed cost, the price-administering firm would produce at a higher output and lower price when it is attempting to maximize sales revenue than when it is trying to maximize profit. This fact is illustrated in Figures 1 and 2.

FIGURE 1

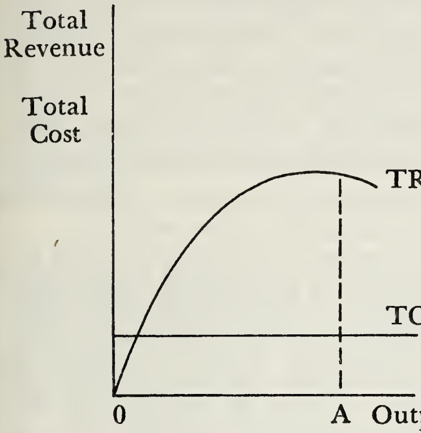

FIGURE 2

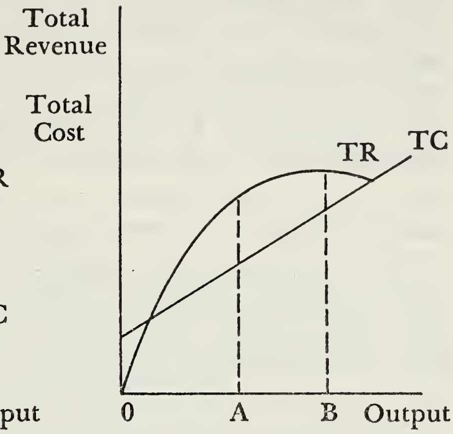

Figure 1 illustrates the extreme case where all cost is fixed cost. The firm's output in physical units is measured on the horizontal axis while total revenue and total cost are measured vertically. The shape of the total revenue curve, concave to the horizontal axis, simply demonstrates that larger quantities will be demanded by consumers at lower prices than will be demanded at higher prices. To put the matter another way, if the firm could sell all it wanted to sell at a constant price, if it could expand production indefinitely and continue to sell the ever increasing output at the original price, the total revenue curve would be a straight line sloping upward and to the right from the origin, for each additional unit of output would increase total revenue by the same amount. But of course this is not the case. Consumers will not buy as much of a product at a higher price as they will at a lower price; therefore, price and the quantity demanded will vary inversely. The shape of the total revenue curve reflects this inverse relationship, this "law of demand." The total cost curve in Figure 1 is a straight horizontal line reflecting the assumption that all cost is fixed cost. Total cost remains the same regardless of the level of output.

Profit is total revenue minus total cost and appears on the graph as the vertical distance between the total cost and total revenue lines. In

Figure 1 this vertical distance is greatest, and thus profit is maximized, at the output represented by Point A, where total revenue is highest, and so in this extreme case the profit-maximizing output is the same as the revenue-maximizing output.

Figure 2 is meant to illustrate the more realistic situation where all cost is not fixed cost. Total cost increases with increases in output because larger outputs require more variable inputs such as direct labor and materials. The total cost line appears as a straight line on the simplifying assumption that average variable cost is constant. In Figure 2, the profit-maximizing output, A, is necessarily lower than the revenue-maximizing output, B. The profit-maximizing output occurs (geometrically) where the slopes of the two curves are equal, while the revenue-maximizing output does not occur (geometrically) until the slope of the total revenue curve is zero, the top of the curve.

In the jargon of the economist, the profit-maximizing output must be lower than the revenue-maximizing output for the following reason. The decision-maker will maximize profit by setting a price where marginal (additional) cost and marginal revenue are equal. So long as all cost is not fixed cost, marginal cost must always be positive, and thus marginal revenue must be positive where it is equal to marginal cost (the profit-maximizing output). If marginal revenue is positive, demand must be elastic, and so long as demand is elastic, a lower price (and larger output) will result in larger total revenue. Thus, so long as all cost is not fixed cost, total revenue can be increased by lowering price below (and increasing output above) the profit-maximizing price.

Of course stockholders, like management, are concerned with making profit; however, because of the degree of separation of ownership and control[24] and because of the interest of management in increasing sales revenue, it is reasonable to assume that output will typically be expanded beyond the profit-making level. Management will attempt to maximize sales revenue but will be limited by some "minimum profit" constraint. To the extent that monopoly (oligopoly) corporations expand output beyond the profit-maximizing point toward the revenue-maximizing point, consumers benefit. Such an expansion leads to a pattern of production and resource allocation that is more responsive to the tastes and preferences of consumers.

The device of the conglomerate merger, however, enables the corporate decision-makers in the monopoly industries to expand sales revenue without sacrificing profit in the primary market because the expansion can occur outside the primary market of the monopoly. Thus, the decision-makers can keep output in the primary markets restricted to the profit-maximizing point while expanding output and sales in competitive secondary markets.

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[24] *See generally* A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1937).

From the standpoint of the monopoly firm it would be desirable to acquire a number of relatively small firms producing products in competitive markets unrelated to the product of the acquiring firm, a truly conglomerate series of mergers. This development would provide the acquiring firm with opportunities to expand output and sales without noticeably affecting price in any market.[25] Thus, stockholders are blessed with maximum profit in the primary market while management obtains increased sales revenue through the increased sales of the conglomerate enterprise.

The same point may be made using a somewhat different approach. As before, the situation under consideration is one in which monopoly (oligopoly) corporations are accumulating substantial amounts of profit and must reach decisions concerning the use of such funds. Again, there are various outlets for these funds, including cash, marketable securities, dividends, and reinvestment in plant and equipment.

The decision-maker will move the funds into that use which appears to be the most advantageous; but in any particular use, the principle of diminishing marginal utility applies. As the firm increases its cash holdings, the attractiveness of still more cash holdings declines, *i.e.,* the greater the volume of cash held by the corporation, the smaller will be the need and the advantage gained from additional accumulations of cash. The corporation will hold cash and certain liquid assets, such as short term government securities, to meet its liquidity needs, but such needs are limited, and as the volume of liquidity holdings increases, the precautionary needs yet to be satisfied with additional amounts of liquid assets are less pressing.

So with the payment of dividends, the advantage to be gained from additional dividend payments declines as the amount of dividend payments increases. When the corporation moves from a position of paying no dividends to one of paying a dividend representing, perhaps, a 2 percent return on stockholder investment, it gains considerable advantage in the form of satisfaction of existing stockholders and attraction of additional stockholders. If dividend payments increase from 2 percent to

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[25] The ultimate effect will be the same if the acquisition is made by purchase or through a stock-for-stock exchange. Of course the purchase has the immediate effect of divesting the acquiring firm of retained earnings while the stock exchange only sets the stage for a future divestment of retained earnings through an increase of production in the competitive market.

4 percent, there will be additional gain of a similar nature as there will be as the rate continues to increase; but clearly the decision-maker will not see as much advantage in moving from 2 to 4 percent as he did in going from 0 to 2 percent, and there will not be as much additional advantage in going from 10 to 12 percent as there was in going from 2 to 4 percent, ect.

The same principle applies to reinvestment in plant and equipment. As the level of new investment increases, the advantage from further investment declines, and this is the case both when management is attempting to maximize sales revenue and when it is trying to maximize profit. This is especially true of monopoly (oligopoly) corporations where increased output must be sold at lower prices than would exist in the absence of the increased output. The marginal efficiency of investment falls as the level of investment increases.

Moreover, the remaining alternative uses for funds may be properly viewed as the cost of any particular use. Thus, if the firm is paying dividends, the real cost to the firm is the cash and marketable securities, and the investment in plant and equipment that must be foregone in order to pay the dividends. Any particular use requires the sacrifice of alternative uses. The decision-maker will maximize his total gain by allocating the funds in a manner such that the advantage obtained from each use is the same at the margin.

The larger the number of outlets for such funds, the smaller will be the amount devoted to each use. The device of the conglomerate merger provides the firm with an additional outlet, and more importantly, it provides an outlet that is an especially attractive substitute for reinvestment in plant and equipment in the firm's primary market. Thus, the conglomerate merger provides most of the advantages of reinvestment in the primary market while eliminating the most severe disadvantage. As with reinvestment in the primary market, the conglomerate merger provides an increase in physical assets and sales revenue, but it does not lead to a lower price and lower profit in the primary market. While the outlet represented by the conglomerate merger will reduce the amount of funds devoted to each alternative use, it will reduce most severely the amount devoted to reinvestment in plant and equipment in the primary market.

The conclusion to be reached can be stated as follows: When monopoly (oligopoly) firms use the device of the conglomerate merger, funds are diverted away from investment in plant and equipment in the monopoly market into investment in acquisition and expansion in competitive markets. If such firms were denied this outlet for profits accruing in the primary market, there would be more expansion in the monopoly areas of the economy and less in the competitive areas. The continuing trend toward the pure conglomerate merger will worsen the distortion of resource allocation in the economy and will lead to a pattern of production less responsive to the wants and needs of consumers.

It may be argued, of course, that if such mergers were prohibited, the same result could be achieved through internal expansion of the monopoly firm into the foreign market,[26] and this is a possibility; however, the same possibility exists in situations in which horizontal and vertical mergers are prohibited by section 7 of the Clayton Act.[27] It goes without saying that harmful economic effects should be prevented when it is legally possible, even though similar effects might result from other means within the law.

Furthermore, the probability of internal expansion in the case of conglomerate enterprise is smaller than in the case of vertical and horizontal expansions; by definition, conglomerate expansion requires diversion into unrelated activities. In all situations, horizontal, vertical, and conglomerate, merger has the advantage (over internal expansion) of providing the expanding firm with a going concern, thus avoiding the difficulties and expense of organization and entry into the market. This factor is especially important in conglomerate situations. In the case of conglomerate internal expansion, the expanding firm must move into lines of business in which plant and equipment needs, personnel qualifications, and production and marketing procedures are likely to be quite different from those of the expanding firm in its primary line of business, and thus the difficulties and expense of such expansion are likely to present substantial barriers. Thus, if the conglomerate merger device were foreclosed, the firm would have a strong incentive to restrict its internal expansion to its primary market.

Because the pure conglomerate merger has been relatively exempt from challenge is not to be mistaken for a lack of concern on the part of the enforcement agencies.[28] It would seem that the pure conglomerate merger has gone unchallenged because of the lack of an adequate theory of economic harm. Indeed, many writers have gone to great lengths to explain how economic harm is impossible under this set of circumstances.[29] Typical is the following statement: "Moreover, a rigid prohibition against conglomerate acquisitions would impair the effective operation of the market as a corrective device by inhibiting the flow of assets into areas of greatest productivity."[30] The argument is made that permitting a company with economic power to enter into an oligopolistic market which is in effect acting as a cartel would have a beneficial economic effect.[31] The acquiring firm, if a firm smaller than the oligopoly leader is acquired, would want to exploit its investment by expanding its production in the acquired market with the result that output would increase and price would fall in the acquired market. The acquiring firm might prefer to buy a leading firm, but the recognized grounds for potential harm are apparent and the antitrust risks much greater. Consequently, the argument is that permitting the firm to acquire a less-than-leading firm would bring about positive economic good, and any rule that would prohibit this would be detrimental to the overall economic welfare.

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[26] The term "foreign market" is meant to describe the market for products unrelated to the product of the acquiring firm.

[27] Clayton Act § 7, 15 U.S.C. § 18 (1970), *formerly* ch. 25, § 7, 38 Stat. 731 (1914).

[28] The pure conglomerate has been the concern of former Commissioner Reilly. Reilly, *supra* note 12.

The economic validity of this proposition is clear so far as it goes, but it ignores the disadvantageous economic effects on the primary market of the acquiring firm. Additionally, it rests on the dubious assumption that the acquiring firm, which has no inclination to engage in price competition in its own primary market, will choose to engage in such competition in the foreign oligopoly market. It seems at least as reasonable to assume that the acquiring firm will become a cooperative member of the foreign oligopoly market.

The most harmful effects are likely to result when the acquiring firm merges into a foreign market which is not already a tight oligopoly, and as matters now stand, these situations are least likely to come under the scrutiny of the regulatory agencies. It is in this situation that resources are diverted directly away from monopoly areas of the economy into more competitive areas. In looking solely at the probability that the acquiring firm will exert undue power in the competitive foreign market or that it will become the dominant firm in that market, the agencies and the courts are not only ignoring important economic aspects of these mergers, but they are also misreading the intent of the acquiring firms. The acquiring firm may have no intent whatever of exerting economic power or becoming a dominant firm in the foreign market. Its intent may be to expand real assets and sales revenue without jeopardizing profits in its primary market, and while there is nothing particularly aggressive and certainly nothing unethical about this intent, the overall economic effect is a direct diversion of resources away from monopoly areas into competitive areas of the economy.

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[29] "The fact is that a truly conglomerate merger cannot be attacked to maintain competition because it has no effect on any market structure." Adelman, *The Anti-Merger Act, 1950-1960,* 51 AMER. ECON. REV. 236, 243; Sichel, *The Proctor & Gamble-Clorox Decision and the Economics of Conglomerate Mergers,* 12 ANTITRUST BULL. 1081.

[30] Rill, *Conglomerate Mergers: The Problem of "Superconcentration,"* 14 U.C.L.A. L. REV. 1028, 1053 (1967).

[31] Shepard, *Conglomerate Mergers in Perspective,* 2 ANTITRUST L. & ECON. REV. 15, 27-29. *See also* Note, *Conglomerate Mergers and Section 7: Is Size Enough?, supra* note 1.

The contention of this article is that, while the courts have been correct in selecting the pertinent economic issues involved in conglomerate merger cases, their selection has been too narrow and restricted. They have not selected issues which are economically irrelevant, but they have failed to see some which are relevant. Commissioner Elman, dissenting in the *National Tea* case,[32] argues against the formulation of per se rules without relevant economic inquiry. He would prefer a rule making procedure to proscribe certain types of acquisitions and would ask the following questions: Will the substitution of the acquiring firm in the market raise the barriers to new entry? Will its presence frighten or dampen the competitive vigor of the existing firms? Does potential competition play an important role as a market regulator and did the entry of the acquiring firm by acquisition constitute the elimination of any meaningful or significant potential competition? Is the industry one in which the national chain has significant advantages over local or regional competitors? Are there any industry conditions which would indicate that a continuation of wide-scale merger activity will eliminate middle-sized local competitors as an effective source of competition?[33] To this list of wholly relevant questions we would add one other. Does the merger result in a diversion of funds and resources away from a less competitive market into a more competitive market? If the answer is in the affirmative the merger should be denied, for on its face it is detrimental to the primary objective of competitive enterprise. It is another step away from a consumer-directed economy toward an administered economy.

It would seem beneficial to formulate a rule that would focus on the strength of the firms in both the market of the acquired firm and the acquiring firm, for the express purpose of preventing monopolization in either market or for the purpose of preventing acquisitions which tend to entrench existing monopoly and further distort the pattern of production. Certainly an inquiry into the relevant economic factors of the merger, if such an inquiry can be made with some efficiency and some degree of certainty, is to be preferred over an arbitrary "cut-off" point that precludes further acquisitions. The failure of such inquiries to produce tangible results in the past probably accounts for the numerical limits set by many writers and the commissions.[34] Antitrust decisions must by necessity paint with a broad brush.

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[32] National Tea Co. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463, at 22,694 (FTC 1966).

[33] *Id. See also* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

If the obstacles to a thorough and meaningful economic analysis are insurmountable so that beneficial results cannot be accurately weighed against harmful effects, the harmful effects should prevail. The argument was made in *United States v. Philadelphia National Bank*[35] that although the merger of two large Philadelphia banks would possibly have anti-competitive effects in the local market, the merger was necessary to enable the bank to compete in the national money market with the large banks of other regions. This argument was expressly rejected by Mr. Justice Brennan who said:

> We reject this application of the concept of "countervailing power.". . . If anti-competitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.[36]
>
> . . . .
>
> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anti-competitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[37]

This focus on the anti-competitive effects without any attempt to balance pro-competitive effects is the only realistic course to take in view of the less-than-adequate body of economic theory concerning conglomerate mergers. Furthermore, this lack of balancing power is not to be regretted, because the overall effects, coupled with rules of prohibition, would be beneficial to the economy.

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[34] *See, e.g.,* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226 (1960); PRESIDENTIAL TASK FORCE REP., *supra* note 11.

[35] 374 U.S. 321 (1963).

[36] *Id.* at 370.

[37] *Id.* at 371.

If an acquiring firm with considerable economic power is prohibited from acquiring essentially any firm via the merger route, but expansion is still desired by the company, there will be a stronger incentive for the firm to expand in its own market, and thus the harmful (restrictive) economic effects will be reduced in that market. Expansion into foreign markets via the route of the conglomerate merger would be left to firms not having monopoly power in their own markets, and in such situations the added competition in the market of the acquired company would be obtained without diverting resources away from industries where output is already too restricted.

While the primary purpose of this article is to show the economic harm resulting from conglomerate mergers, a reasonable theory of economic harm is not by itself sufficient to curtail such merger activity. The question to be answered is whether or not the antitrust statutes are adequate to cope with this violation and whether the courts have recognized this power. Although they have not confronted the precise issue, the Federal Trade Commission and the courts have indicated that the power exists.

In *Scott Paper Co.,*[38] Scott had made a series of acquisitions of suppliers, a vertical merger, and the Commission brought suit to compel divestiture under section 7 of the amended Clayton Act. The theory of the case was not a conventional vertical theory, foreclosure of competition, but rather was brought on a theory of allowing Scott to maintain its dominance in its production. Scott had not adequate production facility to maintain its dominant position in an oligopolistic market and needed more facilities to keep the other companies from supplying the increased demand. The Commission stated that an oligopolistic market is economically unhealthy and initially in the opinion focuses on the slight increase in market power by merger being proscribed, but it did not limit the proscription this narrowly. "Section 7 was intended to foreclose the easy path, through corporate acquisitions, to *maintaining* or achieving market dominance, and to encourage firms to take the harder, but socially more beneficial, path of internal growth."[39]

In *United States v. Philadelphia National Bank,*[40] the Court focused on the aggregate economic effects on the economy when it interpreted the "may be to substantially lessen competition" clause:

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[38] [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,705, at 21,632 (FTC 1964).

[39] *Id.* at 21,637 (emphasis added).

[40] 374 U.S. 321 (1963).

> It [the clause] requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon the competitive conditions in the future; this is what is meant when it is said that the amended Sec. 7 was intended to arrest anticompetitive tendencies in their "incipiency". . . . Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market.[41]

This was a horizontal merger and the economic effects were naturally highlighted, but there is no reason to believe that the Court would not make the same finding in any other merger case if the proscribed effects are present. The important fact to consider is the concern of the Court with the *structure* of the competitive economy. Indeed, this definition of competition that focused on structure was broadened in the same case:

> If concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.[42]

This view and concern with structure has been expressed by the lower courts. In *Crown Zelerbach Corp. v. Federal Trade Commission*,[43] the court evidenced an acute concern with the structure of power in the economy when it said:

> To borrow a phrase from Universal Camera, Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the *absorbing* concern, is to be prohibited for the reason that such increased opportunity for domination will probably lessen competition or tend to create a monopoly. It is its tendency to concentration of power that condemns this merger.[44]

In *United States v. Bethlehem Steel Corporation*,[45] the court held that "'[t]end to create a monopoly' clearly includes aggravation of an existing oligopoly situation."[46]

This view of the structure of the economy taken by the courts and the regulatory agencies clearly expresses a belief in the basic tenents of a free economy which is grounded on the notion of consumer choice. From the economic standpoint, "competition" is not a good end in itself nor is "monopoly," in itself, an economic evil. Competition is desired because it leads to a pattern of production and prices most compatible with consumer demand, while monopoly, to the extent it exists, detracts from such a pattern of production and prices. While it has been argued that protection of the small concern was the motivation of the Congress when it passed much of the antitrust legislation, certainly no one could quarrel with an enforcement policy that led to a greater degree of consumer freedom and preserved small business.

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[41] *Id.* at 362.

[42] *Id.* at 365 n.42.

[43] 296 F.2d 800 (9th Cir. 1961).

[44] *Id.* at 827 (emphasis added).

[45] 168 F. Supp. 576 (S.D.N.Y. 1958).

[46] *Id.* at 607.

With a theory of economic harm and the authority of the courts and regulatory commissions to act under the existing statute established, there remains the problem of proof of a violation within the theory and the statutes. As in most antitrust matters, conclusive proof of the economic harm in question is all but impossible. The agencies and the courts must assess probabilities.

Two recent challenges to pure oligopolistic mergers[47] were markedly similar in rationale and outcome. In *United States v. International Telephone and Telegraph Corp.*,[48] the Justice Department sought to enjoin IT&T, one of the nation's largest corporations, from acquiring Grimnel Corporation, a large manufacturer of automatic sprinkling devices. In *United States v. Northwest Industries, Inc.*,[49] the Justice Department attempted to enjoin B.F. Goodrich, a large rubber manufacturer, from acquiring Northwest Industries, a holding company which controlled a railroad and several chemical companies. Both judges set the same standard of proof for the Department, demonstrable evidence that specific proscribed economic effects would probably result from the merger. In both cases the Department did not meet this burden of proof. The government had proceeded on the usual grounds of reciprocity and concentration. When it was not able to demonstrate likely reciprocal dealing in either case the Department could only fall back on concentration. Neither judge would deny the merger solely because of the size of the companies.

A more recent case, *Kennecott Copper Corp. v. Federal Trade Commission,*[50] involved a merger between the Kennecott Copper Corporation and the Peabody Coal Company. Kennecott is the nation's largest copper producer and the 55th largest corporation in terms of assets, and Peabody is ranked 186th in the nation in terms of assets. In 1971 the merger had been struck down by the Federal Trade Commission.[51] The court accepted the Commission finding that the market entered was not oligopolistic. The focus was not on a large company entering an oligopolistic market; instead it was on the probability of the market becoming oligopolistic. The Commission decision was upheld on the grounds that Kennecott was a potential competitor whose entrance, either through internal expansion or acquisition of a smaller company, would have a beneficial effect on a market likely to become oligopolistic.

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[47] *See* cases cited note 13 *supra*.

[48] 324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed,* 92 S. Ct. 20 (1972).

[49] 301 F. Supp. 1066 (N.D. Ill. 1969).

[50] No. 71-1371 (10th Cir., Sept. 15, 1972).

[51] Kennecott Copper Corp. v. FTC, No. 8765 (F.T.C., May 13, 1971).

Kennecott had a surplus of excess cash reserves forecast to be one billion dollars in 1980 and was seeking to find a satisfactory outlet for these reserves. The court stated that the coal industry "offered about the only outlet for these reserves." Kennecott had entered the coal industry in 1963 by acquiring the Knight Coal Company of Utah, but this small firm had not been a sufficient outlet. As a result, Kennecott, obviously a monopoly in the copper industry, rejected the traditional outlets. A large coal company offered the more desirable acquisition for Kennecott. The court stated that "it was reasonable for the Commission to conclude that Kennecott would use its immense resources to gain for Peabody, already the number one producer in the industry, an even larger share of a market which promises to be a concentrated one in a relatively short time." This speculation may be true, but it is also likely that Peabody offered the largest outlet in the coal industry for the funds, and Kennecott made the purchase with no idea of monopolizing the industry. The threat of striking down the merger when in fact the market has become oligopolistic is always present.[52]

Even if Kennecott never intended to monopolize the coal industry, there is still a misallocation of resources if a purchase into the coal industry is of a large or small company. The issue is only the degree of misallocation. This will be the case if the focus is always on the effect of the market being entered.

The type of conglomerate merger that is the concern of this article is that in which a firm with monopoly (oligopoly) power in its own market is acquiring a firm in a competitive foreign market. Here the courts will likely be even more cautious than in the cases above where the merger was between large firms. However, the economic harm at issue is the direct diversion of resources away from a monopolized area into a competitive area and the problem should be attacked. Clearly the acquiring firm would argue that such funds would not otherwise be used for investment in plant and equipment in its own market if the merger were not allowed, but that they would be used for other purposes, such as dividend payments and investment in marketable securities. The problem of proof here is much like that involved in establishing an elimination of potential competition.[53] It is impossible to prove conclusively that other firms, which would otherwise have entered the foreign market, will not do so as a result of the merger, or that the acquiring firm itself would enter the foreign market through internal expansion if the merger were denied. The issue is a very "hypothetical" one to say the least.

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[52] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

In the issue at hand—cases where a monopoly firm is seeking to merge with a firm in a competitive foreign market—a probability that resources will be diverted away from the monopolized area into the competitive area is more easily established. The attempt to merge, in itself, shows the inclination of the acquiring firm to expand its real assets and sales revenue, *i.e.,* the inclination to become a larger company. In the face of such inclination, it would seem unreasonable to accept the contention of the acquiring firm that all of such funds would otherwise be used for purely financial transactions with none being devoted to an internal expansion of the firm. In short, a large firm with an inclination to become larger is likely to expand internally when the opportunity for merger is denied. Also, it could be argued that the adverse economic effects are presently occurring because of the merger; and the acquiring firm is maintaining market dominance.

To circumscribe essentially all mergers which concern at least one firm that has substantial economic power may seem an undue curtailment of the freedom to do business, but it must be remembered that no one has a license to power.[54] Mergers will be left to those firms with less economic power, while those with power will find it more attractive to pursue internal expansion. The economic implications are clear and beneficial. The adoption of such a policy would be a significant step in the direction of a more consumer-responsive economy. The courts and regulatory agencies should consider an enforcement policy that would include attention to this neglected aspect of merger activity.

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[53] One product extension conglomerate merger was curtailed because the merger would deter potential entrants. United States v. Wilson Sporting Goods Co., 288 F. Supp. 543 (N.D. Ill. 1968).

[54] Even good monopolies are proscribed. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

COMMENTS

INDEMNITY AMONG JOINT TORTFEASORS

I. Introduction

Modern society presents an increasing number of situations in which tort liability may be imposed against more than one party in a single action. Whenever such a situation offers an injured party a choice of defendants from whom to seek recovery, claims for indemnity and contribution may arise. Frequently in multiple party negligence litigation a defense attorney is equally concerned with the possibility of shifting the ultimate loss to a codefendant or third party defendant as he is with defending the plaintiff's claim on the merits.

The doctrine of indemnity is an ancient legal concept which has been applied to numerous and varied relationships. Basically, indemnity is a restitutionary device used to effectuate a fair allocation of loss between two or more persons jointly liable for harm caused to a third person. The scope of this comment is restricted to a consideration of those instances in which one joint tortfeasor is entitled to indemnity from another for amounts paid by the former to compromise or satisfy a third party's claim or judgment. This comment will attempt to review the evolution of the indemnity doctrine in Mississippi, to categorize the different situations where indemnity is allowed, and to explain the complexities inherent in this concept.[1]

II. Origin of Indemnity

Historically, courts have been unsympathetic to wrongdoers in the adjustment of their affairs.[2] Common law courts were particularly reluctant to intervene in disputes between tortfeasors, probably because torts of that day frequently involved an element of moral turpitude.[3] In the famous case of *Everet v. Williams*,[4] where one highwayman sued another for an accounting of their plunder, judicial antipathy for conflicts between transgressors is well documented.[5] But it is generally agreed that the early English case of *Merryweather v. Nixan*[6] promulgated the rule of disallowing contribution between joint tortfeasors.[7] This rule was based on the common law fault concept which required every wrongdoer to be held personally accountable for his own torts whether active or passive.[8] Thus, degrees of fault were not recognized, and common law courts, for the same reason, refused to enforce contracts designed to allow a party to avoid liability for his own negligence.[9] Although *Merryweather* prescribed contribution only where the mutual misconduct was wilful or intentional,[10] eventually this restriction was eliminated. In this regard, American courts have failed to distinguish between intentional or wilful torts and unintentional or negligent torts in applying the rule against contribution.[11]

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[1] For an exhaustive treatment on indemnity, *see* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517 (1952) [hereinafter cited as Davis].

[2] *E.g.*, Hodges, *Contribution and Indemnity Among Joint Tortfeasors*, 26 Tex. L. Rev. 150, 162 (1947).

[3] Comment, *Contribution and Indemnity Among Joint Tortfeasors*, 33 Tenn. L. Rev. 184 (1966).

[4] *Noted* in 9 L.Q. Rev. 197 (1893).

Because such widespread adoption and imposition of the controversial[12] rule often inflicted rather harsh and inequitable results,[13] it was inevitable that exceptions to the rule against contribution would arise. Particularly as society became more complex and new interrelationships arose between varied business interests, justice demanded the formulation of legal and equitable principles permitting reimbursement to those passively negligent parties from those found actively negligent.[14] In response to a changing society, courts became more receptive to the argument that there should be an adjustment of the common burden away from a mere passive wrongdoer, individually saddled with complete liability because of technical reasoning from outmoded concepts of tort liability.[15] American jurisdictions, while retaining the rule against contribution, quite early introduced the exception which permitted one tortfeasor to be indemnified by a co-tortfeasor under certain circumstances.[16] At least as early as the 1930's, these indemnity exceptions were firmly established, while contribution, even in those few jurisdictions where it was permitted, was largely restricted. Thus, the doctrine of indemnity, allowing exoneration or reimbursement from the primary wrongdoer to the party having satisfied the injured person, developed in a majority of American jurisdictions where contribution was not permitted. Either the party incidentally or nominally liable was granted indemnification or there could be no apportionment of the loss among those responsible.[17]

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[5] The plaintiff's bill was dismissed and his solicitors each fined fifty pounds for contempt. *Id.* (The parties were subsequently hanged).

[6] 101 Eng. Rep. 1337 (K.B. 1799).

[7] *See* Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan,* 12 HARV. L. REV. 176 (1899); Annot., 60 A.L.R.2d 1366 (1958); RESTATEMENT OF RESTITUTION § 102 (1937) sets forth the rule as follows:

> Where two persons acting independently or jointly, having negligently injured a third person or his property for which injury both became liable in tort to a third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other.

[8] H. MCNEAL, INDEMNITY—A GENERAL REVIEW 4 (1963) (Defense Law Institute Monograph) [hereinafter cited as MCNEAL]; *See* Note, *Contribution and Indemnity Among Tortfeasors,* 31 MONT. L. REV. 69, 71 (1969), which suggests as additional justification for the rule: (1) tort law is a punitive force for discouraging anti-social conduct and a denial of contribution deters the commission of such conduct; (2) the law has no scales to determine the relative fault of the parties; (3) contribution is impractical in terms of judicial expenditure of time and expense.

[9] MCNEAL, *supra* note 8, at 4.

[10] 101 Eng. Rep. 1337 (K.B. 1799).

[11] Allen, *Joint Tortfeasors—A Case for Unlimited Contribution,* 43 MISS. L.J. 50, 52 (1972) [hereinafter cited as Allen].

[12] For a series of articles for and against the rule, *see* Gregory, *Contribution Among Joint Tortfeasors: A Defense,* 54 HARV. L. REV. 1170 (1941); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism,* 54 HARV. L. REV. 1156 (1941); James, *Replication,* 54 HARV. L. REV. 1178 (1941).

[13] Allen, *supra* note 11, at 51-53.

In Mississippi contribution was not allowed until 1952,[18] but indemnity was a recognized cause of action as early as 1838.[19] Mississippi, like other jurisdictions which initially allowed indemnity but refused contribution, required the entire burden to be placed upon the first joint tortfeasor to satisfy the joint judgment, regardless of his degree of culpability unless he could prove indemnity against a co-wrongdoer. But the significance of indemnity, even in those jurisdictions which now allow both remedies of contribution and indemnity, remains undiminished, particularly because of the dissimilarities of the two remedies.[20] It is essential that the astute practitioner distinguish those situations where his client might successfully impose the burden of an adverse judgement on another wrongdoer from those situations where a claim for indemnity might be successfully resisted.[21]

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[14] McNEAL, *supra* note 8, at 14.

[15] *Id.*

[16] Werner, *Contribution and Indemnity in California,* 57 CALIF. L. REV. 490 (1969).

[17] *Id.*

[18] In that year contribution between joint tortfeasors against whom a judgment had been rendered, became effective. Act of April 15, 1952, ch. 259, GEN. LAWS MISS. That provision is now codified as MISS. CODE ANN. § 335.5 (1956). For a discussion and evaluation of this contribution statute, *see* Allen, *supra* note 11, at 55-57.

[19] The early case of Hough v. Perkins, 3 Miss. (2 How.) 724 (1838), dealt with pleading in an action on an indemnity bond.

[20] For a discussion of the distinctions between indemnity and contribution, *see* text *infra.*

[21] Davis, *supra* note 1, at 518.

III. Indemnity Defined and Distinguished

The term "indemnity," meaning security or protection against loss or damage, is often employed in two related but different ways: (1) in the sense of giving security, as by executing a bond to secure performance; and (2) in the sense of relieving a party from liability for damage previously accrued.[22] This comment concentrates on the situations referred to in the second usage.

In *Builders Supply Co. v. McCabe*[23] the Pennsylvania Supreme Court lucidly explained the basis for the right to idemnity in the following language:

> The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a different in *degrees* of negligence or on any doctrine of *comparative* negligence — a doctrine which, indeed, is not recognized by the common law. . . . It depends on a difference in the *character* or *kind* of the wrongs which caused the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.[24]

Indemnity, then, implies a primary or basic responsibility in one person, although a second is also liable with the first to the third. Discharge of the obligation by the second party leaves him with the right to secure compensation from the one who, as between themselves, is primarily liable.[25] There are two critical prerequisites for invocation of non-contractual indemnity. First, the damages which a prospective indemnitee seeks to shift must have been imposed on him as a result of some legal obligation to the injured person. In addition, it must appear that the claimant did not actively or affirmatively participate in the wrong.[26] Although the right to indemnity may spring from contract either express or implied,[27] principles of equity are inherent in the doctrine which allows a shifting of a common burden to the party actually responsible for the loss. Where one party is compelled to pay damages which in fairness and good conscience ought to be paid by the wrongdoer, allowance of indemnity may be justified on the quasi-contractual theory to prevent unjust enrichment.[28]

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[22] 41 Am. Jur. 2d *Indemnity* § 1 (1968).

[23] 336 Pa. 322, 77 A.2d 368 (1951). The right to indemnity is recognized by the Restatement of Restitution § 76 (1937):

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

[24] 336 Pa. 322, 77 A.2d 368, 370 (1951).

[25] 41 Am. Jur. 2d *Indemnity* § I (1968).

[26] Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970).

Perhaps because both contribution and indemnity are restitutionary which in fairness and good conscience ought to be paid by the wrongdoers, courts have frequently though mistakenly intermingled the two terms.[29] Even the noted jurist Learned Hand once referred to indemnity as "only an extreme form of contribution."[30] However, there is a marked distinction between a right of contribution, which implies an apportionment or sharing of the loss among those jointly responsible, and a right to indemnity, which implies a shifting of the entire loss to the tortfeasor primarily responsible.[31] Contribution allows a wrongdoer who has been held liable for damages to recover from each of his co-tortfeasors a ratable portion of the total liability discharged. The goal which contribution seeks is the equalization of a common burden.[32] Indemnity, on the other hand, concentrates on the character of the common liability and allows the co-tortfeasor who has discharged a common burden to recover the entire amount from the party primarily liable.[33]

In those jurisdictions which afford wrongdoers the remedies of both contribution and indemnity, some confusion has arisen in determining the correct remedy.[34] As a general rule, where the tortfeasor's negligence concurred to cause the injury to a third person, indemnity is denied, but contribution is imposed. However, where the tortfeasor required to satisfy the common obligation is liable only vicariously or by operation of law, contribution would be inappropriate, but indemnity would be allowed.[35] In Mississippi, where the right to contribution is restricted to those cases in which joint judgments have been entered against the joint tortfeasors,[36] an indemnity action may become the only remedy available to a joint wrongdoer sued individually by the injured party. Thus, even though Mississippi recognizes both remedies, the restrictive application of the right to contribution inhibits a fair and equitable distribution of the joint liability.

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[27] Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968).

[28] Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 147 (1932).

[29] Allen, *supra* note 11, at 50.

[30] Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951).

[31] Note, *Contribution and Indemnity Among Tortfeasors, supra* note 8.

[32] 42 C.J.S. *Indemnity* § 3 (1944).

[33] Sherk, *Common Law Indemnity Among Joint Tortfeasors,* 7 ARIZ. L. REV. 59 (1965).

[34] *See* Comment, *Contribution Among Joint Tortfeasors,* 44 TEX. L. REV. 326, 329 (1965).

[35] Note, *Contribution and Indemnity Among Tortfeasors, supra* note 8, at 77-78.

Contracts of suretyship and express contracts of indemnity are similar in that the purpose of each is to provide security against loss. Nevertheless, the dissimilarities of the two concepts are significant and are discussed by one noted authority[37] as follows:

> The great difference between the two [indemnity and contribution] lies in the character of the promisee. In suretyship, the promise runs to an obligee or creditor, present or prospective. In indemnity, the promise runs to an obligor or debtor present or prospective. In suretyship the promisee has or is about to extend credit to a third person, the principal, and the promise is made to protect the promisee creditor in case the principal fails to perform. In indemnity, the promisee owes or is about to assume an obligation to a third person, the creditor, and the promisor agrees to save him harmless from loss as a result of his assuming that obligation.[38]

The fact that the indemnitor's promise of security is made to an obligor or debtor points up another important distinction between suretyship and indemnity. Express contracts or promises to indemnify are generally not within the statute of frauds.[39] In contrast, contracts of suretyship, being promises to answer for the debt of another, must conform to the dictates of the statute of frauds.[40] Thus, whether an obligation is one of suretyship or indemnity may determine whether the agreement is actually enforceable.[41]

The promise in an indemnity contract is an original undertaking, whereas the promise in a guaranty contract is a collateral undertaking.[42]

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[36] Miss. Code Ann. § 335.5 (1956). Maraist & Barksdale, *Mississippi Products Liability—A Critical Analysis,* 43 Miss. L.J. 139, 191 (1972), suggests that such a restrictive approach to contribution results in a paradox in the only state which employs "pure" comparative negligence. The jury is allowed to apportion negligence and damages between the plaintiff and defendant(s), but is not allowed to apportion damages between defendants.

[37] L. Simpson, Handbook on the Law of Suretyship § 17 (1950).

[38] *Id.*

[39] Corbin, *Contracts of Indemnity and the Statute of Frauds,* 41 Harv. L. Rev. 687, 697 (1928).

[40] L. Simpson *supra* note 37, § 39.

[41] *See, e.g.,* Love v. Dampeer, 159 Miss. 430, 132 So. 439 (1931), where the determination of whether the contract involved was one of guaranty or one of indemnity materially affected its enforceability.

[42] Kochan v. American Fire & Cas. Co., 200 So. 2d 213 (Fla. App. 1967).

An indemnity agreement differs from a contract of guaranty in that the liability assumed is not secondary but primary. The indemnity promise is not a contract to answer for the debt, default, or miscarriage of another but to indemnify the promisee from loss owing to his contractual liability.[43] A contract of indemnity obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability but never directly to perform the obligation indemnified, whereas a contract of suretyship obligates the guarantor to perform the obligation in the event the principal fails to perform.[44] Finally, while an indemnity agreement requires only an indemnitee and indemnitor, a suretyship agreement requires a surety, a principal, and a promisee or obligee.[45]

IV. CATEGORIES OF INDEMNITY

For analytical purposes indemnity may be conveniently subdivided into three categories, depending on the source of the obligation: (1) express contractual indemnity, (2) implied contractual indemnity, and (3) non-contractual or common law indemnity. As a practical matter, however, the latter two categories tend to blend into one another so that in practice the distinction may become purely academic.

A. Express Contractual Indemnity

Express contractual indemnity is perhaps the most familiar and most easily applied category of indemnity. With increasing frequency, parties seeking to lessen financial liabilities are executing contracts containing specific "hold harmless" agreements, whereby one party agrees to hold another harmless from some or all claims which may arise out of performance of the contract.[46] The extent of each party's obligation with respect to such an indemnity agreement is determined from the contract according to the fundamental rules governing the requisites and validity of contracts[47] and not by reference to the independent doctrine of implied or non-contractual indemnity. Thus, as indicated earlier, the promise made in an express indemnity contract is an original as opposed to a collateral undertaking, and the liability assumed is a primary one.[48]

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[43] *Id.*

[44] New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

[45] *Id.*

[46] McKenna & Bartler, *Developments in the Law of Indemnity,* 1 THE FORUM 7 (1965) [hereinafter cited as McKenna] suggests that particularly those parties engaged in the transportation and industrial fields, highly susceptible to being designated "target defendants," utilize express indemnity clauses.

[47] Pickens-Bond Constr. Co. v. North Little Rock Elec. Co., 249 Ark. 389, 459 S.W.2d 549 (1970); 41 AM. JUR. 2d *Indemnity* § 13 (1968).

The express contract to indemnify is not restricted to the comparatively simple relationship which originates by contract between insurer and insured. Often the indemnity agreement is included as a clause in a more general contract.[49] Common examples include such a clause in the agreement between a prime contractor and his subcontractor,[50] or between an independent contractor and the owner or other party to whom he is rendering a service.[51] These agreements to indemnify against future liability in negligence are not against public policy[52] and are generally enforceable, but they will be strictly construed.[53] Where the parties resort to litigation for construction of express indemnity agreements, the meaning will be determined by reading the disputed clause as a whole and in context, not by isolating phrases and considering them independently.[54]

Indemnity clauses in written contracts may be classified as either limited or unlimited clauses. As the title suggests, a limited indemnity clause offers incomplete protection to the party seeking insulation. Where the indemnity clause in construction contracts only obligates the subcontractor to reimburse an owner or prime contractor against the subcontractor's own negligence, no substantial protection beyond that ordinarily afforded the indemnitee under common law indemnity principles is obtained.[55] Nevertheless, an unlimited indemnity clause which purports to hold one harmless under all circumstances will normally provide complete protection.[56] Whether such a clause will protect the party seeking indemnity against his own negligence is determined by evaluating the words of the clause itself. The Mississippi Supreme Court, in adopting the majority rule in this area, made the following comment:

> [S]ome courts have held that in order for an indemnitee to be indemnified against his own negligence, the indemnity contract

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[48] Molinari, *Implied Indemnity in California,* 8 SANTA CLARA LAW. 159, 160 (1968).

[49] Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa,* 52 IOWA L. REV. 31, 37 (1966).

[50] Blain v. Sam Finley, Inc., 226 So. 2d 742 (Miss. 1969).

[51] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963).

[52] *See* McKenna, *supra* note 46, citing cases at 8 n.9.

[53] United States Fid. & Guar. Co. v. Mason & Dulion Co., 274 Ala. 202, 145 So. 2d 711 (1962).

[54] Liberty Mut. Ins. Co. v. North Laurel Shopping Center, Inc., 410 F.2d 96 (5th Cir. 1969).

[55] McKenna, *supra* note 46, at 9.

[56] *Id.*

> must contain express language to that effect. However, the better rule and that which is followed by a majority of the courts is that the indemnitee will be indemnified against his own negligence when the contract shows by clear and unequivocal language that this is the intention of the parties.[57]

B. Implied Contractual Indemnity

The theory of implied contractual indemnity is a relatively new category of indemnity which received little attention prior to 1956. In that year, however, the doctrine was recognized and expanded by the United States Supreme Court in *Ryan Stevedoring Co. v. Atlantic Steamship Corp.*[58] In *Ryan,* the issue was whether, in the absence of an express indemnity agreement, a stevedoring contractor was obliged to reimburse a shipowner for damages caused it by the contractor's improper storage of cargo. An employee of the stevedoring contractor had been injured in performing storage work pursuant to an informal agreement between the contractor and the shipowner. The employee recovered a judgment against the shipowner while the shipowner sought indemnity from the contractor. In allowing the indemnity claim, the Court recognized that the stevedoring contractor's agreement necessarily included an obligation not only to stow the cargo but to stow it properly and safely. The Court viewed the contractor as a warrantor of its services and granted indemnity on the basis of the implied obligation.[59] In subsequent stevedoring cases, the Supreme Court continued to ratify the concept of implied contractual indemnity.[60] However, the theory has been invoked only rarely outside the maritime field.[61]

Mississippi courts have not had occasion to review the *Ryan* doctrine, but the Fifth Circuit Court of Appeals, applying Mississippi law, has refused to extend the *Ryan* doctrine outside of the maritime field. In *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.,*[62] in deciding whether to allow indemnity on an implied contractual in-indemnity theory, the court found no justification for allowance of the claim in Mississippi law. This conclusion was stated in the following colorful language:

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[57] Blain v. Sam Finley, Inc., 226 So. 2d 742, 746 (Miss. 1969).

[58] 350 U.S. 124 (1956).

[59] In so holding, the Court used the following extremely broad language:

> This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product . . . [I]t is clear that, as between themselves, the contractor as the warrantor of its services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. [*Id.* at 133-35].

[60] Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958). For a discussion of the *Ryan* doctrine, *see* Comment, *The Ryan Doctrine: Present Statute and Future Development,* 37 TUL. L. REV. 786 (1963).

[61] *See* McKenna, *supra* note 46, at 15-20 for a detailed discussion of the ramifications of the *Ryan* doctrine outside of the maritime area.

> In short, *Ryan* was conceived as an admiralty concept, and its explicatory progeny have not denied its paternal thesis. We find nothing in the wake of *Ryan* to lead us to apply its principles to landlubbers. It is abundantly clear that no tributary of *Ryan* reaches the Brookhaven Oil Field in Lincoln County, Mississippi, which is many miles inland from both the Mississippi River and the Gulf of Mexico. Consequently, in deciding this issue we cannot distill Mississippi law through a federal sieve; we must completely abandon the admiralty domain and repair to Mississippi's inland terrain. Looking solely to Mississippi's independent jurisprudence, we are unable to find any authority clearly indicating that Mississippi recognizes a *Ryan*-type implied contract of indemnity. . . . Accordingly we must conclude that Monsanto is not entitled to indemnity on the basis of its contract theory.[63]

Whether the Mississippi courts would follow the restrictive approach of the Fifth Circuit Court of Appeals with regard to implied contractual indemnity is an open question. The broad language utilized by the United States Supreme Court suggests a more liberal application. In any event, the theory will undoubtably have particular appeal for imaginative counsel seeking indemnification in situations where it would otherwise be prohibited.

C. *Non-contractual or Common Law Indemnity*

The third category of indemnity, non-contractual or common law indemnity, offers the most interesting if not the most confused applications of indemnity principles.[64] In contrast to the types of indemnity previously discussed, common law indemnity is not founded in contract, but traces its historical background to principles of tort law and equitable considerations of unjust enrichment and restitution. The critical inquiry in common law indemnity situations is to the quality or character of fault attributable to each joint tortfeasor. In comparing the relative character of the fault of the party seeking indemnity with the party resisting indemnity, the majority of courts grant reimbursement to the tortfeasor whose negligence is denominated merely "passive or imputed, secondary or negative" as opposed to the tortfeasor whose negligence is designated "active, primary or positive."[65] It has been suggested that the doctrine which allows indemnity to the passive wrongdoer may have originated from the common law theory which considered misfeasance to be a greater wrong than nonfeasance.[66] As a practical matter, however, application of this test enables a court to circumvent the remaining vestiges of the common law rule prohibiting contribution and indemnity between tortfeasors and to impose ultimate liability on the tortfeasor whose principal negligence caused the original loss.[67]

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[62] 420 F.2d 1103 (5th Cir. 1970).

[63] *Id.* at 1111.

[64] Davis, *supra* note 1, at 536 laments:

> It is a good deal easier to list cases in which indemnity has or has not been allowed than it is to make sense out of them. It is well nigh impossible to work all of the indemnity cases into a consistent whole, and the language which the courts have employed in explaining their indemnity decisions is bewildering, to say the least.

But the active-passive test for allowance or disallowance of common law indemnity is much easier to state than to apply consistently.[68] Cases which have dealt with the question of non-contractual or common law indemnity present a confusing picture, and the active-passive test has often been critcized.[69] Much of the confusion stems from the failure of courts to define active or passive negligence in such a way as to establish effective guidelines for future litigants.[70]

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[65] Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970); 41 AM. JUR. 2d *Indemnity* § 20 (1968); Davis, *supra* note 1, at 543-44 lists the following variations of the basic test:

> "constructive" and "actual" negligence, "party immediately in fault," "positive tort" and "primary and efficient cause," "primary and active wrongdoer," "principal delinquent," "primary cause," "real cause," "principal and moving cause," "the wrongdoer in the physically participative sense and the wrongdoer in the legally relative sense," "concurrent or joint tort-feasors as distinguished from related tort-feasors," "active wrongdoer or primarily negligent party."

[66] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51 (4th ed. 1971).

[67] McKenna, *supra* note 46, at 22.

[68] *See, e.g.,* Thornton & McNiece, *Torts and Workmen's Compensation,* 32 N.Y.U.L. REV. 1465, 1471 (1957):

> When the judges of the appellate courts disagree so violently in these indemnity cases, a trial judge may well be pardoned if he too guesses wrong now and then. Indeed, in deciding what negligence is "active" and what is "passive," a trial judge will receive almost as much assistance from tossing a coin as he will from pondering the opinion of the appellate tribunals.

[69] Davis, *supra* note 1, at 539-44; Leflar, *supra* note 28, at 156; Comment, *Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader,* 28 FORDHAM L. REV. 782, 787 (1960).

[70] McKenna, *supra* note 46, at 22.

The Mississippi Supreme Court recently confronted the problem of determining the quality of negligence attributable to concurrent tortfeasors in a non-contractual indemnity action. In *Home Insurance Co. v. Atlas Tank Manufacturing Co.,*[71] an employee of Atlas had been electrocuted while operating a piece of machinery beneath the 13,000-volt utility distribution line owned by Mississippi Power and Light Company. After settlement with the heirs of the deceased, MP&L and its insurer, the Home Insurance Company of New York, sued Atlas to recover indemnity. The proof indicated that Atlas had begun filling and leveling the area beneath the line and had notified MP&L that as a consequence the line had become dangerously low. Nevertheless, Atlas continued to stack butane tanks beneath the line after MP&L had advised that no work be done in the area. The chancellor found that a reasonable effort was made by Atlas to have the line elevated and denied the indemnity claim, ruling that because MP&L had knowledge of the danger, failure to take remedial steps was active and not passive negligence. The Mississippi Supreme Court affirmed the chancellor's findings, categorizing the negligence of Atlas as "virulent" and that of MP&L as "gross negligence." The court held that where the joint tortfeasors were *in pari delicto* there could be no indemnity recovery.[72]

Although the result in the *Home Insurance Co.* case rather dramatically indicates the inequities in not allowing contribution between concurrent tortfeasors,[73] the decision is nonetheless correct in terms of indemnity principles. But the case also demonstrates the problem of utilizing such a vague and indefinite test in determining whether to permit indemnity in non-contractual or common law indemnity cases. Perhaps unintentionally, the court in the *Home Insurance Co.* case specifically articulates the problem of employing the word formula test where it stated the issue:

> Was the admitted negligence of the appellant active, primary, or positive or was it passive, secondary, or negative? These words are the designations universally used to differentiate the indemnifiable from the non-indemnifiable types of negligence.[74]

The opinion appears unsatisfactory in that no attempt is made to define the critical terms in such a way as to suggest definite criteria for the disposition of future non-contractual indemnity cases. In actuality, the court did no more than to recount the stipulated and disputed facts and to categorize these facts as establishing active negligence on the part of both litigants, thereby precluding indemnity. In cases where such a judicial attitude is apparent, it has been suggested that the mere phrasing of the issue or the description of the negligence can be determinative under the active-passive formula for non-contractual indemnity.[75]

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[71] 230 So. 2d 549 (Miss. 1970).

[72] *Id.* at 554.

[73] For a thorough discussion of the problem in Mississippi and a recommended solution, *see* Allen, *supra* note 11, at 57-59.

[74] 230 So. 2d 549, 551 (Miss. 1970).

In spite of the confusion which the non-contractual or common law indemnity situations have produced, it is possible to classify the cases in which the party seeking indemnity has been successful in having his actions termed passive or secondary, thus enabling him to recover indemnity. Generally, common law indemnity has been permitted in at least three broad categories of cases: (1) in cases where liability is imposed without fault; (2) in cases where liability is imposed for breach of a non-delegable duty; and (3) in cases where liability is imposed on concurrent tortfeasors.

1. Liability Without Fault

The most desirable cases for allowance of common law indemnity and those in which this category of indemnity is most frequently allowed are those where the negligent or wrongful act of one person causes the injury, but the law permits the injured person to recover from someone other than the wrongdoer. In these cases the party liable without fault may recover indemnity from the actual wrongoer.[76]

There are several different situations where indemnity is permitted by an indemnitee whose liability to an injured third party is based merely on negligence imputed to him. A common example of liability without fault or liability based upon imputed negligence is where a master is vicariously liable for the damage caused by a servant acting within the scope of his employment under the doctrine of respondeat superior.[77] In these situations indemnity is universally allowed.[78] Thus, a master who has been obligated to make compensation to a third party through the sole wrong of the servant may recover indemnity from the servant.[79] Where the indemnitee is directed or employed by another to do an act not manifestly wrong and is held liable to a third person as a result, he may recover indemnity from the employer.[80] Under the same rationale, a principal is allowed indemnity from his agent where the principal is held liable to another for the negligent acts of the agent solely on the basis of the agency.[81] In these cases, the indemnitee has typically been liable without fault. However, indemnity is not granted by virtue of the agency relationship alone.[82] Where the principal is found to have been actively negligent and not merely negligent solely by imputation, indemnity has been denied.[83] In addition, where the owner of an automobile is vicariously liable to a third party for the negligence of the driver, the owner is permitted to recover indemnity against the driver.[84] In these cases the technically or vicariously negligent owner is entitled by way of common law indemnity to reimbursement from the actively negligent driver.[85]

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[75] Davis, *supra* note 1, at 542.

[76] Comment, *Contribution and Indemnity Among Joint Tortfeasors, supra* note 3, at 186 (1966).

[77] 53 AM. JUR. 2d *Master and Servant* § 404 (1970); RESTATEMENT (SECOND) OF AGENCY §§ 219, 243 (1958); *see, e.g.,* Todd v. Natchez-Eola Hotels Co., 171 Miss. 577, 157 So. 703 (1934).

[78] *But cf.* Note, *D.W. Boutwell Butane Co. v. Smith—Employee Exoneration with Employer Liability—An Anomaly,* 42 MISS. L.J. 515 (1970), which suggests that imposition of liability upon an employer solely because of a tort committed by his employee where the employee is exonerated is a misapplication of the doctrine of respondeat superior. Such a result in effect precludes the employer from obtaining

The same principle applies in any case where the one seeking indemnity has been held liable, not because of any personal fault, but because of a duty imposed by law on the basis of his relationship to another which makes him responsible for the negligence of another.[86] Beyond the well-defined master-servant or principal-agent relationships a contractor not personally at fault may recover indemnity from his subcontractor whose negligent acts caused the loss.[87]

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indemnity from the negligent employee since under Mississippi law, exoneration of the employee is res judicata to the action for indemnity. *See also* Central Sur. & Ins. Corp. v. Mississippi Export Ry., 91 F.2d 125 (5th Cir. 1937); Note, *D.W. Boutwell Butane Co. v. Smith—Employee Exoneration with Employer Liability—An Anomaly, supra,* at 523 n.56.

[79] Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So. 2d 216 (1941); 41 AM. JUR. 2d *Indemnity* § 22 (1968).

[80] Leflar, *supra* note 28, at 150. Thus, where a contractor in good faith built a bridge as directed by the city, he was entitled to indemnity for damages for trespass because the city had not acquired title to the land. Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924).

[81] Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964); Granquist v. Crystal Springs Lumber Co., 190 Miss. 572, 1 So. 2d 216 (1941).

[82] Note, *Contribution and Indemnity Among Tortfeasors, supra* note 31, at 78 n.68 *citing* William F. Larrick, Inc. v. Burt Chevrolet, Inc., 147 Colo. 133, 362 P.2d 1030 (1961).

[83] *Id.*

[84] Hertz Corp. v. Richards, 224 So. 2d 784 (Fla. App. 1969).

[85] Roth v. Cannel, 242 So. 2d 491 (Fla. App. 1970).

[86] Davis, *supra* note 1, at 519.

[87] *E.g.,* Bowyer & Johnson Constr. Co. v. White, 255 F.2d 482 (5th Cir. 1958).

2. Non-Delegable Duty

A second broad category of cases wherein non-contractual or common law indemnity is allowed involves situations where liability is imposed on one party for violation of a non-delegable duty, while another party was actually responsible for the injury or damage. This class of cases, although analagous to those where liability is imposed without fault, is distinguishable on the basis that the indemnitee's culpability here is predicated upon his breach of the non-delegable duty involved.[88] Municipalities assume a non-delegable duty to maintain streets and sidewalks in reasonably safe condition.[89] In *Bush v. City of Laurel*[90] the municipality recovered indemnity from a contractor for amounts paid in settlement of a claim by a pedestrian injured on a sidewalk under construction. While the city's liability was based exclusively on its non-delegable duty, the contractor was actively responsible for the cause of the injury. Thus, the city was not *in pari delicto* with the contractor and indemnity was deemed proper.[91]

A similar situation exists where a land owner is held liable for breach of his duty to maintain his premises in a reasonably safe condition for persons invited, expressly or impliedly, to enter thereon.[92] The land owner is entitled to indemnity from the party actually creating the dangerous condition which precipitates the harm, unless the land owner had discovered the condition and failed to alleviate it.[93]

In products liability litigation, courts apply the non-delegable duty rationale to indemnify one who becomes liable to another through the use of a defective product.[94] Typically, the indemnitee is liable merely for breaching some positive duty owed to the injured party, though the indemnitor actually created the original risk which caused the harm.[95]

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[88] Hodges, *supra* note 2, at 155.

[89] Indemnity cases of this type are so numerous that at least one writer treats them as an entirely separate category. *See* Davis, *supra* note 1, at 524.

[90] 215 So. 2d 256 (Miss. 1968).

[91] *Id.* and cases cited at 260.

[92] RESTATEMENT OF RESTITUTION § 95 (1937) states:

> Where a person has [become] liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

[93] Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957), discussed in Sherk, *supra* note 33, at 69-70.

[94] 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44.02 (1) (1970); Sherk, *supra* note 33, at 63-64 & n.23 *citing* Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954). *See also* Annot., 28 A.L.R.3d 943 (1969).

Cases where the indemnitee's liability is imposed solely for his failure to discover the dangerous condition which the indemnitor created are closely akin to the non-delegable duty cases because of the great disparity in culpability between the indemnitor and indemnitee. In *Central Surety & Insurance Corp. v. Mississippi Export Railway*,[96] the Fifth Circuit Court of Appeals restated the applicable Mississippi law in this area:

> It is true in Mississippi as in other common law jurisdictions that without statutory aid joint tort-feasors being in pari delicto cannot force contribution among themselves. . . . But it is also established that, where there is no joint action by the two persons in causing an injury and no par delictum, but there is wrongful conduct by one which creates a danger which results in injury and the liability of the other rests only on a failure to discover or remedy the dangerous condition, the latter may often have indemnity from the former when held liable to the person injured.[97]

However, where the prospective indemnitee's acquiesence in the dangerous condition is indicated by continued awareness of its existence without taking corrective measures or requiring the indemnitor to do so, indemnity will not be permitted.[98]

3. Concurrent Negligence

This category of non-contractual indemnity cases presents the most difficult factual situations. Included here are the unusual cases in which the equities of the situation might require indemnity, though the loss occasioned by the concurrent negligence might better be distributed by allowing contribution. The much discussed Tennessee case of *Cohen v. Noel*[99] furnishes an excellent example. In that case, an employee of a public garage owner was injured when an automobile struck the ladder on which he was working. After settlement with the injured employee, the automobile owner sought indemnity from the garage owner. The Tennessee Supreme Court, applying the active-passive test, allowed indemnity to the "passively" negligent automobile owner from the garage owner deemed "actively" negligent for maintaining a dimly lighted garage.[100]

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[95] Comment, *Contribution and Indemnity Among Joint Tortfeasors, supra* note 3, at 186.

[96] 91 F.2d 125 (5th Cir. 1937).

[97] *Id.* at 126.

[98] Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); 41 Am. Jur. 2d *Indemnity* § 17 (1968).

[99] 165 Tenn. 600, 56 S.W.2d 744 (1933).

It is difficult to explain such an ironic result. The facts presented a close case of concurrent negligence and the court, confronting the semantic problems of the active-passive formula, produced a strained application. In the *Cohen* case, as well as the *Home Insurance Co.* case, it seems that contribution would have been the more appropriate remedy. If contribution were allowed in all situations where both tortfeasors were concurrently negligent rather than just in those cases where a joint judgment had been entered against them, non-contractual indemnity could be restricted to the categories discussed earlier.[101] Perhaps this solution would better effectuate the goals of both remedies in equitably distributing a mutual liability.

V. GENERAL CONSIDERATIONS

A. *Other Tests*

The continuing inability of some courts to agree on the common factual content of the various terms used in the familiar active-passive formula has tempted commentators to suggest new tests and some jurisdictions to modify or abandon the old standard. Texas, for example, has discarded the active-passive test in favor of one which concentrates on the quality of the duties existing between the tortfeasors.[102] One writer has articulated this test in the following way:

> Where the plaintiff's injuries are caused by the negligence of both tortfeasors, but one tortfeasor also breaches a duty to the other, then the tortfeasor who breaches no similar duty is entitled to indemnity. If there are joint tortfeasors who are in pari delicto and neither breaches a duty toward the other, contribution is the appropriate remedy.[103]

Another writer has suggested that the better rationale would be to examine the disproportionate duties owed by the tortfeasor to the injured party.[104] Where the duties owed to the injured party are approximately equal, the case may properly be one for contribution. Where the duties are disproportionate and the difference is enough to warrant a complete shifting of the loss, indemnity should be allowed.[105] It has also been proposed that joint tortfeasors be separated into technical, concurrent, and intentional classifications and indemnity awarded on the basis of this classification.[106]

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[100] *Id.* at 746.

[101] *E.g.*, Comment, *Contribution Among Joint Tortfeasors, supra* note 34, at 329.

[102] *E.g.*, Humble Oil & Ref. Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949); Wheeler v. Glazer, 137 Tex. 341, 153 S.W.2d 449 (1941); Hodges, *supra* note 2, at 162.

[103] Comment, *Contribution Among Joint Tortfeasors, supra* note 34 at 329.

[104] Davis, *supra* note 1, at 546.

Close scrutiny of these proposals, however, reveals that they are in effect only variations of the classic active-passive formula, complete with the same semantic difficulties and ambiguities. All of these proposals essentially provide indemnity where there is a difference in the gravity or character of the fault between the joint tortfeasors. This same result is realized by application of the active-passive formula. Perhaps the better solution would be for the courts, in applying the active-passive test, to articulate with more specificity the factutal criteria relied upon in denominating negligent conduct as either active or passive.

B. *Indemnity Disallowed*

Since indemnity requires a primary responsibility on the part of the indemnitor, no recovery will be allowed where the fault of each joint tortfeasor is determined to be equal in grade or similar in character.[107] Thus, in cases where the parties are found to be *in pari delicto,* no adjustment of the liability is permitted.[108] In addition, for indemnity to be permitted it must appear that the claimant seeking to shift the damages paid the injured party as a result of some legal obligation and under compulsion. In *Southwest Mississippi Electric Power Association v. Harragill,*[109] the power association sought indemnity from the truck dealer and welding company after settling the claim of an automobile operator injured when the power truck's brakes failed. The power association alleged that it had purchased the truck requesting that it be equipped with electric brakes, that the installation of the brakes was defective, and that reasonable inspection and maintenance had failed to uncover the defect. The court denied indemnity, holding that the proof indicated that the power association would not have been liable to the injured party and that the settlement was a voluntary undertaking.[110] Similarly, no indemnification can be recovered by a person cast in judgment against a third party if the party cast had a defense available against an injured person but failed to assert it.[111]

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[105] *Id.* at 546-47.

[106] Comment, *Contribution and Indemnity Among Joint Tortfeasors, supra* note 3, at 209-10.

[107] Home Ins. Co. v. Atlas Tank Mfg. Co,. 230 So. 2d 549 (Miss 1970).

[108] *Id.* at 554.

[109] 254 Miss. 460, 182 So. 2d 220 (1966).

Various other special circumstances may exist which preclude indemnity. Suit may not be brought by a creditor of the indemnitee against the indemnitor directly until the liability of the indemnitee has been established.[112] A prime contractor who terminates a subcontract and directs subcontract work becomes the employer of the former subcontractor's employees. In such a situation the contractor is precluded from recovering indemnification from the former subcontractor for settlements in a workman's death.[113]

The exclusive remedy provision of many workmen's compensation statutes prevents a third party, held liable to an employee, from recovering indemnity from the employer on a tort theory.[114] Section 6998-05 of the Mississippi Code[115] sets forth the remedial exclusivity of the action in Mississippi. That section reads in part:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death.[116]

Although no Mississippi case has passed precisely on the question of whether the exclusive remedy provision precludes a third party's indemnity claim against the employer, the Fifth Circuit Court of Appeals, "surrogating for Mississippi until it speaks authoritatively," held that the exclusive liability provision of the statute would "stand as a Horatio at the bridge" to bar such an indemnity claim.[117]

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[110] *Id.* at 468, 182 So. 2d at 223.

[111] Jones v. Wright, 258 So. 2d 195 (La. App. 1972).

[112] Gully v. First Nat'l Bank, 183 Miss. 385, 184 So. 615 (1938).

[113] C.H. Leavell & Co. v. Doster, 233 So. 2d 775 (Miss. 1970).

[114] Davis, *supra* note 1, at 534.

[115] MISS. CODE ANN. § 6998-05 (1956).

[116] *Id.*

[117] Smith Petro. Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1112 (5th Cir. 1970).

C. *Procedural Matters*

In Mississippi, claims for indemnity have been brought both in chancery[118] and circuit[119] courts. But indemnity claims are unnecessarily hindered in Mississippi courts by an incomplete procedure which does not provide third party practice.[120] Failure to allow third party actions encourages both delay and a multiplicity of actions. It is hoped that a procedural device, allowing third party practice and disposition of all claims in one action, will soon be available in Mississippi practice.

Before an indemnitee can maintain a claim for indemnity, he must have suffered an actual loss.[121] In Mississippi practice, the party seeking indemnity may proceed either in contract or tort but not in both theories in the same suit.[122]

The general rule regarding the measure of damages allows the indemnitee to recover that amount actually expended by the indemnitee as a consequence of the indemnitor's actions.[123] As a necessary part of his damages, the indemnitee may recover reasonable attorney's fees, expenses including court costs, interest, and the cost of an unsuccessful appeal when taken with the indemnitor's authority.[124]

VI. CONCLUSION

Indemnity is a viable remedy available to a joint tortfeasor required to satisfy a joint responsibility in a variety of situations. The extent to which implied contractual indemnity will be recognized in Mississippi remains unresolved. Nevertheless, in view of the restrictive approach taken by the Fifth Circuit Court of Appeals, the remedy of implied contractual indemnity may be all but foreclosed in Mississippi.

Although the active-passive test for determining whether to allow non-contractual or common law indemnity has been criticized, the classic formula is essentially the same type of test as the suggested substitutes. A conscientious judicial effort to define the factual content of the terms utilized in the active-passive formula and its variations would serve to alleviate much of the confusion surrounding indemnity situations.

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[118] *E.g.*, Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970).

[119] *E.g.*, C.H. Leavell & Co. v. Doster, 233 So. 2d 775 (Miss. 1970).

[120] *See* Security Mut. Life Ins. Co. v. Brunson, 176 Miss. 893, 170 So. 824 (1936).

[121] B & G Elec. Co. v. G.E. Bass & Co., 252 F.2d 698 (5th Cir. 1958); United Gas Corp. v. Guillory, 206 F.2d 49 (5th Cir. 1953); 41 AM. JUR. 2d *Indemnity* § 32 (1968).

[122] Nasif v. Booth, 221 Miss. 126, 72 So. 2d 440 (1954).

[123] 42 C.J.S. *Indemnity* § 24 (1944).

[124] Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968). Attorney's fees incurred by a prime contractor in successfully defending a suit by the subcontractor's employee were recovered by the prime contractor by way of indemnity in B & G Elec. Co. v. G.E. Bass & Co., 252 F.2d 698 (5th Cir. 1958).

In Mississippi, procedural reform allowing some type of third party practice is necessary to prevent a multiplicity of suits and the consequent delays where indemnity situations are concerned. In addition, the right to contribution should be extended in order to enable the restitutionary devices of indemnity and contribution to insure a fair distribution of a joint liability.

Thomas M. Murphree, Jr.

LEGAL MALPRACTICE IN MISSISSIPPI

I. Introduction

Courts, being themselves made up of lawyers, historically[1] have been reluctant to hold attorneys liable for negligence to their clients.[2] In England, for example, barristers were not liable for negligence to a client[3] because there was no privity between the barrister and the litigant (the solicitor being an intermediary because of England's bifurcated bar). Today, however, it seems likely that the widespread use of malpractice insurance by attorneys will temper the reluctance of judges to find their brethren at the bar liable for malpractice. Other pressures may be generated by public dissatisfaction with the legal profession as evidenced in books such as *The Trouble With Lawyers*.[4] Thus it is apparent that Mississippi attorneys should have some understanding of Mississippi decisions in this area of the law and how they could be potentially affected.

Negligent acts by an attorney which constitute actionable malpractice,[5] *i.e.*, a breach of duty owed to a client or a third party which gives rise to a right of action for damages, will be discussed in this comment. Such negligent acts are to be distinguished from other forms of attorney misconduct or attorney-client disagreements such as: (1) champerty and maintenance[6] which constitute the criminal offense of stirring up litigation, (2) unethical conduct[7] for which the penalty may be reprimand,[8] suspension[9] or disbarment[10] in an action before the chancery courts in Mississippi, (3) disputes over rights to, or the legality of, fees (such as under contingency fee contracts[11]), and (4) fraudulent acts or violations of the fiduciary aspect of the attorney-client relationship[12] such as an attorney dealing with a client's property for his own benefit when he has a duty to protect the client's interest. The major emphasis of this comment will be upon Mississippi case law dealing with legal malpractice; however, in areas of interest where Mississippi Supreme Court decisions are lacking, the law of other jurisdictions will be discussed.

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[1] *See* Wade, *The Attorney's Liability for Negligence*, 12 Vand. L. Rev. 755 (1959).

[2] An apparent example of the reluctance of a trial judge to allow a malpractice suit against an attorney is Solomon v. Meyer, 89 So. 2d 865 (Fla. 1956), and Solomon v. Meyer, 116 So. 2d 34 (Fla. App. 1959). The trial judge initially dismissed the client's complaint and was reversed by the Supreme Court of Florida. 89 So. 2d 865 (Fla. 1956). Subsequently the trial judge granted summary judgment to the attorney, and the Florida Court of Appeals reversed, ordering a trial for the client. 116 So. 2d 37 (Fla. App. 1959).

[3] Wade, *supra* note 1, at 755.

[4] M. Bloom, The Trouble with Lawyers (1968).

[5] *See generally* Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. Va. L. Rev. 225 (1958); Leavitt, *The Attorney as Defendant*, 13 Hastings L.J. 1 (1961); Wade, *supra* note 1; Note, *Attorney Malpractice*, 63 Colum. L. Rev. 1292 (1963); Annot., 45 A.L.R.2d 5 (1956).

[6] Miss. Code Ann. §§ 2049-01 to -08, 8683, 8684 (1956).

[7] *See generally* American Bar Ass'n, Code of Professional Responsibility (1969).

[8] Miss. Code Ann. § 8713 (1956).

[9] *Id.* § 8712.

[10] *Id.* § 8711.

II. The Standard of Care Required of an Attorney

In the early case of *Fitch v. Scott*,[13] the Mississippi Supreme Court stated that an attorney has a duty to use a "reasonable degree of care, skill and despatch (sic)" and that there must be "gross negligence or ignorance" for there to be liability of an attorney to his client. However, in *Thompson v. Erving's Hatcheries, Inc.*,[14] its most recent pronouncement on this subject, the Mississippi Supreme Court indicated that the test was not whether there was gross negligence on the part of the attorney, but merely whether there was a failure to exercise reasonable care, skill and knowledge. The court stated:

> While occasional language may be found, especially in the earlier cases, suggesting that an attorney is liable to his client for the conduct of litigation only where he is chargeable with gross negligence or want of skill, it appears to be the presently well-settled rule in most if not all of the American jurisdictions in which the question has arisen that an attorney to whom the conduct of litigation may be held liable to his client for damages resulting from his failure to exercise ordinary care, skill, and diligence, or, as it is frequently expressed, that degree of care,

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[11] *E.g.*, Pocius v. Halvorsen, 30 Ill. 2d 73, 195 N.E.2d 137 (1964); Bounougias v. Peters, 49 Ill. App. 138, 198 N.E.2d 142 (1964); Annot., 13 A.L.R.3d 673 (1967); Annot., 13 A.L.R.3d 701 (1967); Annot., 77 A.L.R.2d 411 (1961).

[12] The attitude with which courts approach such dealings between attorney and client is illustrated by our court's statement in Gwin v. Fountain, 159 Miss. 619, 126 So. 18 (1930):

> [D]ealings between an attorney and his client are held as against the attorney to be prima facie fraudulent, and the attorney, in order to sustain such a transaction which is advantageous to him, has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he, himself, had not been interested. [*Id.* at 645, 126 So. at 22.]

[13] 4 Miss. (3 How.) 314 (1839).

[14] 186 So. 2d 756 (Miss. 1966).

> skill, and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction.[15]

The court alludes to a locality rule for degree of care required of attorneys just as there is a locality rule[16] for physicians, but no decisions of the Mississippi Supreme Court have ever turned upon this point regarding attorneys. One reason for this is probably that the Mississippi Supreme Court has never required the plaintiff to put on expert testimony[17] in order to make a prima facie case against a lawyer for negligent performance of his duties.

An attorney may also be liable for negligence although he adhered to the customary practice of attorneys in his locality.[18] *Gleason v. Title Guarantee Co.*[19] involved a situation in which an attorney gave an opinion that title to certain property was clear and certified that he had made "a personal examination of all public records." The title was not clear, however, and the attorney in reality relied upon an examination by an abstractor. Despite a showing that the attorney had followed the customary local practice, the Fifth Circuit Court of Appeals found that he had been negligent and stated: "No degree of antiquity can give sanction to a usage bad in itself."[20] In *Gleason* the attorney involved was really guilty of a nonfeasance rather than a malfeasance, and it could be argued that an action in contract for breach of an implied warranty was the proper remedy rather than an action in tort. This could be significant in that some courts have found strict liability for the breach of an implied warranty in performing personal services.[21] It could also be important where the statute of limitations for contract is longer than that for tort.[22]

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[15] *Id.* at 757, *quoting* Annot., 45 A.L.R.2d 5, 11-12 (1956).

[16] In states that mention locality, it is statewide in effect. For example, the Supreme Court of Washington in Cook, Flanagan & Berst v. Clausines, 73 Wash. 2d 393, 438 P.2d 865 (1968) stated: "The standards of practice in this jurisdiction as a qualification for the practice of law are the same throughout the state, and do not differ in its various communities." *Id.*, 438 P.2d 866. The state of Washington abolished the locality rule for physicians in Douglas v. Bussabarger, 73 Wash. 2d 829, 438 P.2d 476 (1968).

[17] Wade, *supra* note 1, at 766 states: "No such requirement [of expert testimony] appears to have developed in actions against attorneys." But in at least one jurisdiction expert testimony is required to make a prima facie case. Dorf v. Relles, 355 F.2d 488 (7th Cir. 1962).

[18] This is reminiscent of the products liability doctrine that a company can be negligent in failing to do something that no one in the industry has ever done. *See* Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

[19] 300 F.2d 813 (5th Cir. 1962) (applying Florida law).

[20] *Id.* at 814, *quoting* Leach v. Three of the King's Messengers, 19 How. St. Trials 1027 (1765).

III. WHAT PROOF IS REQUIRED OF A PLAINTIFF?

Proof of negligence by an attorney is only one of the elements necessary for the prosecution of a malpractice action; it must also be shown that damages resulted and that the attorney's negligence was the proximate cause of the loss.

Thus if an attorney were to allow the running of the statute of limitations to bar his client's action, in a subsequent malpractice action the client would have to prove that he would have won his original suit, for otherwise he would have suffered no real damages. As a practical matter, this means that he must try his original action as a part of the malpractice action.[23] The Mississippi Supreme Court in *Thompson v. Erving's Hatcheries, Inc.*[24] found that the attorney had been guilty of negligence in allowing the statute of limitations to bar his client's action on an open account. Nevertheless, the court remanded the case for a retrial on the issue of damages indicating that besides proving negligence on the part of the attorney, the client must prove (1) that he was entitled to a judgment in his original action which had become barred and (2) that such a judgment would have been collectible, *i.e.*, that the client's debtor was solvent.[25] To the same effect is the holding in *Hoover v. Shackelford:*[26]

> The plaintiff should have proved that the makers of the note, which defendant undertook to collect, were able to pay it, or some part thereof; and that a failure to collect resulted from the gross negligence of the defendant.[27]

Fitch v. Scott[28] illustrates one method of proving the solvency of a debtor. In *Fitch* the attorney was negligent in failing to file suit at the first term of court as directed by his client. By the next term of court the debtor was insolvent; however, the client had the sheriff testify that during the previous term of court he had "made money on" (presumably this means collected) all executions returned against the debtor. So, proof of damages requires a showing that (1) a judgment would have been achieved and (2) the judgment would have been collected in whole or in part.

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[21] *See* Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 196 N.W.2d 316 (Mich. Ct. App. 1972); Newmar v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970).

[22] *See* section IV (A) *infra.*

[23] For a discussion of this point see Coggin, *supra* note 5.

[24] 186 So. 2d 756 (Miss. 1966).

[25] After retrial on these two issues the client again appealed and the supreme court rendered a verdict in his favor. 204 So. 2d 188 (Miss. 1967).

[26] 23 Miss. 520 (1852).

[27] *Id.* at 521.

[28] 4 Miss. (3 How.) 314 (1839).

Similar standards are applied in cases where the right of appeal has been lost due to an attorney's failure to file a timely notice of appeal. In such a situation the client must prove negligence *and* that the case would have been reversed on appeal because the client would have sustained no damage if the judgment would have been affirmed. The California District Court of Appeals in *Pete v. Henderson*[29] stated this proposition as follows: "[A] plaintiff in such a case must plead and prove that the appeal, had it been taken, would have resulted in a reversal."[30]

Only two cases have been found where damages were awarded for failure to take a timely appeal. In *McAleenan v. Massachusetts Bonding and Insurance Co.*[31] recovery was allowed, but the defendant's argument that no damages had been proved was ignored by the New York Court of Appeals on the grounds that damages had been found as a matter of fact by the trial court. In *Drais v. Hogan*[32] the attorney obtained an order for a new trial, but that order was reversed[33] upon appeal as the attorney had failed to follow the statutory procedure in making such a motion. He had assured his clients that an appeal was unnecessary; however, the California Supreme Court indicated that an appeal should have been taken from the judgment itself since the complaint was fatally defective:

> [T]he grossest mismanagement after all is found in his failure to appeal the judgment itself. The complaint . . . upon which the judgment against Lucinda Drais was founded was radically defective and wholly insufficient to support the judgment . . . in this view it was inexcusable in the defendant to have permitted the time limited by statute for an appeal from the judgment itself to pass away, and so to allow the rights of the defendant in that action to become lost in the abortive attempt to obtain a new trial, when such new trial, even if it had been obtained, was not necessary for her probation under the circumstances.[34]

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[29] 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

[30] *Id.*, 269 P.2d at 80.

[31] 232 N.Y. 199, 133 N.E. 444 (1921).

[32] 50 Cal. 121 (1875).

[33] Budd v. Drais, 50 Cal. 120 (1870).

[34] 50 Cal. 121, 127-28 (1875).

Therefore, one way of showing that the judgment of the trial court could have been reversed on appeal is to demonstrate that the pleadings were defective. Other proof might consist of showing that the evidence was insufficient to support the judgment of the trial court or that as a matter of law no recovery could be had on the facts alleged and proven.

IV. Defenses

A. Statute of Limitations

The statute of limitations will bar recovery if allowed to run by the client. But what statute of limitations is to be applied?[35] Four conclusions have been reached in American jurisdictions:[36] (1) the basis for recovery as disclosed by the complaint controls,[37] (2) the statute of limitations relating to actions of "malpractice" is applied,[38] (3) actions against an attorney for negligence are based upon breach of contract and are controlled by the statute of limitations related to contracts,[39] (4) statutes governing action upon a "liability" not founded upon a written instrument are applied.[40]

The Mississippi Supreme Court has never squarely faced the problem of whether a malpractice action against an attorney is in tort (involving a breach of his duty to use reasonable knowledge and diligence) or whether it is in contract (due to a breach of his implied warranty that he will employ skill, knowledge and diligence). In most of the Mississippi cases the court has discussed the actions as if they were founded upon tort, but in *Johnson v. Crisler*[41] the Mississippi three year statute of limitations for contracts[42] was applied rather than the six year statute of limitations[43] for tort actions. Breach of contract was alleged in *Johnson v. Crisler* because the attorney attached a false certificate to an abstract of title, but apparently counsel made no contention that the six year statute should apply. It appears that the wrong choice of remedy was made[44] since the action could easily have been styled as one in the tort of deceit. The court has applied the six year statute of limitations to an action of deceit[45] where the acreage contained in a tract of land was misrepresented to the purchaser, and it would seem equally applicable to a misrepresentation of the state of title of real property as in *Johnson v. Crisler.*

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[35] For a good discussion of this problem see Annot., 49 A.L.R.2d 1216 (1956).

[36] *Id.*

[37] *Id.* at 1217; *see, e.g.,* Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955).

[38] Annot., 49 A.L.R.2d at 1218; *see, e.g.,* Galloway v. Hood, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

[39] Annot., 49 A.L.R.2d at 1220; *see, e.g.,* Shirmer v. Nethercutt, 157 Wash. 172, 288 P.2d 265 (1930).

[40] Annot., 49 A.L.R.2d at 1222; *see, e.g.,* Jensen v. Sprigg, 84 Cal. App. 519, 258 P. 683 (1927).

[41] 156 Miss. 266, 125 So. 724 (1930).

[42] Presently found in MISS. CODE ANN. § 729 (1956).

[43] *Id.* § 722.

Although the Mississippi Supreme Court has never expressly decided what statute of limitations applies to attorney malpractice actions, and since both the three year statute of limitations for contracts and the six year statute of limitations for torts have been applied in different cases, the logical conclusion is that a choice of remedies is available. Accordingly, if the statute of limitations might be a problem, the complaint should be styled as being in tort so as to obtain the benefit of the longer statute of limitations.

Another question concerning the running of the period of limitations is when does the statute of limitations start to run?[46] Is it from the date of the injury, or is it from the date of discovery of the injury? *Johnson v. Crisler*[47] provides the following answer:

> In an action against an abstractor of titles to land for damages caused by the furnishing of a false abstract, it is immaterial, so far as the running of the statute of limitations is concerned, whether the negligence out of which the cause of action arose, was the breach of a contract, an affirmative disregard of some positive duty; in either case the cause of action accrues when the abstract of title is certified to and delivered. *The statute of limitations runs from that time and not from the time the damage occurs.*[48]

Even if the attorney has concealed his negligence, it would appear that the concealment would not toll the running of the statute of limitations. In *Cook v. Rives*[49] an attorney collected money for a client and allegedly concealed the fact of collection from his client. His client claimed that the concealment was fraudulent and should toll the running of the statute of limitations, but the Mississippi Supreme Court held:

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[44] *See* Wade, *supra* note 1, at 772 (indicating that when a plaintiff has elected a remedy, the courts usually have accepted that choice).

[45] Dunn v. Dent, 169 Miss. 574, 153 So. 798 (1934).

[46] *See* Annot., 18 A.L.R.3d 978 (1968).

[47] 156 Miss. 266, 125 So. 724 (1930).

[48] *Id.* at 269, 125 So. at 725 (emphasis added). The Mississippi rule in medical malpractice is the same; the statute of limitations runs from the time the injury occurs. *See* Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So. 2d 651 (1955). *But see* Alabama Great Southern R.R. v. Allied Chem. Corp., No. 71-3534 (5th Cir., Aug. 23, 1972) (construing Mississippi statute of limitations in products liability cases to run from time injury discovered).

[49] 21 Miss. (13 S. & M.) 328 (1850).

> If the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he cannot avail himself of the exception. A case could scarcely occur of collection of money by an attorney, in which the fact would not be discovered by reasonable diligence. The payment ought to be endorsed upon the execution and filed with the records. If that should not be done, inquiry of the sheriff, or of the defendant would lead to knowledge of the fact.[50]

Therefore, alleged concealment of misconduct of an attorney will not necessarily toll the running of the statute of limitations.

In litigation involving negligence in drafting a will, the question of when the statute of limitations begins to run is often of primary importance. *Goldberg v. Bosworth*[51] involved an attorney who was sued by a son who witnessed his mother's will at the lawyer's request and who was deprived of a devise thereby. The will was executed eight years before the testatrix's death, and the New York Supreme Court held that the statute of limitations started running from the date of execution and had run by the time of her death thus barring any action by the son.

A contrary view was taken in *Heger v. Flaig*[52] where the attorney was advised by the testatrix that she planned a post-testamentary marriage, and the attorney failed to draft the will to allow for this contingency. The California Supreme Court held that the statute of limitations had not run on the beneficiaries' cause of action against the attorney and stated:

> The statute of limitations does not commence to run until the testatrix' death, at which time the defendant's negligence becomes irremediable and before which time the plaintiffs possess no recognized legal interest in the testatrix' estate.
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> ....
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> The negligence involved in the original drafting of the will continued after that date in defendant's failure to advise the testatrix of the possible undesired consequences if she died without having changed her will.

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[50] *Id.* at 330. In Hudson v. Kimbrough, 74 Miss. 341, 20 So. 885 (1896), the court did hold that fraudulent concealment would toll the running of the statute of limitations, but, again, the client failed to exercise due diligence. It would be an unimaginative court that would fail to find some aspect of negligence where the client failed to exercise due diligence in letting the statute of limitations run.

[51] 29 Misc. 2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. 1961).

[52] 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

> . . . .
> A second basic reason that bars the running of the statute until the testatrix' death lies in the fact that plaintiff could not bring an action against the defendant before that time. A statute of limitations does not commence to run until a cause of action accrues, and a cause of action . . . invariably accrues when a remedy is available.[53]

No Mississippi decisions have been found in this area. Assuming that the decision in *Johnson v. Crisler* was followed, however, the statute of limitations would run from the time the will was executed and delivered to the client.

B. Lack of Privity

Lack of privity between an attorney and the person suing him has traditionally been a good defense.[54] Its major importance in America is in the area of wills where the beneficiary who has been deprived of a bequest because of alleged faulty drafting of the will has not been allowed to sue the drawer of the will, since there was no privity between the drawer and the beneficiary. However, the trend in this area is to sweep away the requirement of privity and allow suit against the attorney drawing the will. This trend is indicated by the development of the law in California as discussed below.

In *Buckley v. Gray*[55] it was felt that an attorney who improperly draws a will is not liable to third parties (beneficiaries) who are injured thereby. In *Biakanja v. Irving*[56] the Supreme Court of California held a notary who drafted a will liable to a beneficiary who lost his bequest because of negligent failure to have the will properly attested. The court there noted that it was a matter of public policy involving the balancing of various factors whether a third party not in privity should be allowed to recover on such a transaction. Finally, in *Lucas v. Hamm,*[57] *Buckley* was explicitly overruled; however, the beneficiary still did not triumph in *Lucas*. The bequest in the will violated the rule against perpetuities, and the California court noted that the rule is "a trap for the unwary" and that many eminent lawyers have barely escaped the trap. Thus, the court held that it was neither negligence, nor breach of contract to fall into the trap, and the attorney was not liable.

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[53] *Id.,* 449 P.2d at 165-67, 74 Cal. Rptr, at 229-30.

[54] *See* section I *supra.*

[55] 110 Cal. 339, 42 P. 900 (1895).

[56] 49 Cal. 2d 647, 320 P.2d 16 (1958).

[57] 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied,* 368 U.S. 987 (1961).

C. *Contributory Negligence*

In most states the effect of acts constituting contributory negligence would depend upon whether the action is in tort or contract. In tort actions contributory negligence is usually a bar to the maintenance of the action; however, in an action in contract the same action would not be a bar but it would act to mitigate damages.[58] In Mississippi, however, contributory negligence would not be a bar due to our comparative negligence statute,[59] but would serve to mitigate damages in tort actions. It has been pointed out, however, that contributory negligence is rarely used as a defense.[60]

D. *Lack of Actionable Damages*

A final defense is that, even if the attorney were negligent, the client suffered no damage. Thus in the retrial of *Erving's Hatcheries, Inc. v. Thompson,*[61] the attorney defendant attempted to prove (unsuccessfully) that Erving's Hatcheries would have lost their suit against their original debtor because the debtor had a good defense of breach of warranty on the goods delivered to him by Erving's Hatcheries.

In *Grayson v. Wilkinson*[62] an attorney allowed a default judgment to be taken against his client. In a subsequent malpractice action, the attorney successfully raised the defense that he was never informed by the client of the defense he had against the suit in which the default judgment was rendered. The Mississippi Supreme Court noted that "[i]f the defendant can prove that the defense was not a good one, then the plaintiff can . . . recover, at most, nominal damages."[63] Therefore, it is a good defense to show that a client's claim which was lost by an attorney's negligence was valueless anyway.

V. THE MEASURE OF DAMAGES

The measure of damages in a suit for an attorney's negligence in handling a suit has been given as:

> The value of the lost claim, that is, the amount which would have been recovered in the client's action except for the at-

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[58] *See* Coggin, *supra* note 5, at 233.

[59] MISS. CODE ANN. § 1454 (1956).

[60] *See* Annot., 45 A.L.R.2d 5, at § 4 (1956).

[61] 204 So. 2d 188 (Miss. 1967).

[62] 13 Miss. (5 S. & M.) 268 (1845).

[63] *Id.* at 288.

> torney's negligence, is at least a proper element of damages, and it is frequently spoken of as "the" measure of damages.[64]

Similarly, where a faulty certification of title has been given, the measure of damages has followed

> [t]he established rule that the tort or contract liability of a party is limited to the difference in value between what the plaintiff's property is worth and what it would be worth but for the fault of the defendant. We have found no precedent for requiring the defendant in effect to purchase the property from the plaintiff, as the judgment below directs.[65]

The above statements make it clear that the measure of damages in a malpractice suit for an attorney's negligence is about the same as in any other tort or contract action and that there are no special rules applicable to this particular area of law.

VI. Acts Constituting Negligence

The following acts have been held to constitute actionable negligence by an attorney in Mississippi: failing to file a suit promptly as directed by the client,[66] entering an appearance without authority,[67] failing to defend a client's action,[68] allowing the statute of limitations to bar a client's action,[69] dismissing a suit without authority,[70] negligent acts of those taking over affairs entrusted to a retired attorney,[71] compromising a client's claim without authority,[72] returning money collected from a debtor to the debtor because of a disagreement with the client over the attorney's demand for a larger fee than was originally agreed,[73] and losing a client's funds by turning them over to a third person for delivery contrary to the client's instructions.[74]

In other jurisdictions the following have been found to constitute actionable negligence by an attorney: preparation of improper findings which were adopted by the court as its judgment,[75] failure to inform a client that a judge's ruling is contrary to general law and would probably be reversed on appeal,[76] failure to file timely notice of appeal,[77] failure to properly draft a mortgage instrument which was governed by the law of a foreign jurisdiction,[78] failure to have a will properly attested[79] (this was done by a non-attorney — a notary), paying money of an infant into court rather than to the infant's guardian,[80] abandonment of conduct of litigation without justifiable cause,[81] failure to make proper examination of title,[82] failure to record a deed in the proper county,[83] and failure to inform a client that an instrument needed to be recorded.[84]

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[64] Annot., 45 A.L.R.2d 63 (1956).

[65] Gleason v. Title Guar. Co., 300 F.2d 813, 815 (5th Cir. 1962).

[66] Fitch v. Scott, 4 Miss. (3 How.) 314 (1839).

[67] Schirling v. Scites, 41 Miss. 644 (1868).

[68] Grayson v. Wilkinson, 13 Miss. (5 S. & M.) 268 (1845).

[69] Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966).

[70] Coopwood v. Baldwin, 25 Miss. 129 (1852).

[71] Wilkinson v. Griswold, 20 Miss. (12 S. & M.) 669 (1849).

[72] Lombard v. Whiting & Lewis, 1 Miss. (Walker) 229 (1826).

[73] Nathan & Co. v. Halsell, 91 Miss. 785, 45 So. 856 (1908).

[74] Grayson v. Wilkinson, 13 Miss. (5 S. & M.) 268 (1845).

[75] Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871 (1929).

It should be noted that since decisions made during the trial of a case have to be "made in the heat of battle" and involve "tactical considerations that are not susceptible of precise evaluation," most courts will not second guess an attorney's decisions made in the course of a trial.[85] In *Lynn v. Lynn*[86] the Washington Supreme Court expressed this attitude of courts as follows:

> Attorneys frequently differ on trial tactics. . . . A difference in opinion on trial tactics, however, does not constitute either negligence or incompetence. The test of skill and competence of counsel is: After consideration of the entire record, was the complaining party afforded a fair trial?[87]

The California court in *Nahhas v. Pacific Greyhound Lines*[88] was more emphatic as to an attorney's right to control the trial of a case, stating:

> It is common experience that attorneys and their clients frequently differ and even violently disagree between or among themselves with reference to the conduct or procedure which should relate to the trial of the action. However, it is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action.[89]

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[76] Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686 (1968).

[77] Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

[78] Degen v. Steinbrink, 202 App. Div. 477, 195 N.Y.S. 810 (1922).

[79] Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 ,1958).

[80] *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929).

[81] Howard v. McCarson, 215 Ala. 251, 110 So. 296 (1926).

[82] Gleason v. Title Guar. Co., 300 F.2d 813 (5th Cir. 1962).

[83] Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S.W. 29 (1925).

[84] Feil v. Wishek, 193 N.W.2d 218 (N.D. 1971).

[85] Note, *Attorney Malpractice, supra* note 5, at 1301.

[86] 4 Wash. App. 171, 480 P.2d 789 (1971).

[87] *Id.,* 480 P.2d at 792.

[88] 192 Cal. App. 2d 145, 13 Cal. Rptr. 299 (1961).

[89] *Id.,* 13 Cal. Rptr. at 300.

These statements show that much more than a mere difference of opinion is necessary before negligence will be found in the trial of an action.

VII. Representing Conflicting Interests

As a final note, consider the danger inherent in representing multiple parties. In some circumstances conflicting interests may be present, and unless the attorney makes a full disclosure of this to both parties and fairly represents the interests of both parties, he may be guilty of negligence.[90] One situation in which this is likely to happen is where the same attorney represents both the insurer and the insured, either in settlement negotiations or the trial of a personal injury action. The interest of the insurer is usually to settle below the limits of coverage of the insurance policy while the insured may be willing to settle for a higher figure in order to avoid the possibility of judgment well in excess of the policy limits.

A case which illustrates the dangers involved in such a situation is *Lysick v. Walcom*,[91] where Rardin was insured by Allstate Insurance Company under a policy limited to $5,000 for bodily injury to any one person and $10,000 for all bodily injury arising out of a single accident. An automobile driven by Rardin collided with an automobile driven by Vitaly Lysick and in which Alexander Lysick was a passenger; all three persons were killed in the accident. A wrongful death action was brought by the family of the two Lysicks, and Allstate hired an attorney (Walcom) to handle the action on behalf of Allstate and Rardin's estate. The plaintiffs offered to settle their claims, totalling $450,000, against the estate of Rardin for $12,500. Rardin's executor offered to pay $2,500 if Allstate would pay $10,000, but Allstate was at this point only willing to pay $9,500. Finally, Allstate authorized Walcom to settle for the policy limit of $10,000, but Walcom did not communicate this fact to Rardin's administrator until six days before trial of the action. This was over one year after Allstate authorized Walcom to contribute $10,000 towards settlement. By this time, however, Rardin's administrator had died and the $2,500 he had offered was no longer available since it had been his personal funds. Consequently, the action went to trial and resulted in a judgment of $225,000 against Rardin's estate in favor of the plaintiffs. The plaintiffs obtained an assignment from Rardin's estate of any cause of action that it might have against Allstate and Walcom and then instituted the present action alleging bad faith in Allstate's refusal to settle the claims against Hardin's estate and negligence on the part of Walcom in representing the estate. Prior to trial the plaintiffs compromised their claims against Allstate for $89,000. A verict of the trial court in favor of Walcom was reversed, and the California Court of Appeals found that as a matter of law the attorney had been negligent in his representation of the estate stating:

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[90] *See* Annot., 28 A.L.R.3d 389 (1969).

[91] 368 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

> The uncontradicted facts in the present case can lead a reasonable man to conclude only that the defendant acted solely upon practical considerations in the interests of Allstate and considered his duties to the insurance company paramount to his duties to the estate. By continuing to act as counsel for the estate, while entertaining the belief that his primary obligation in the matter of settlement was to the insurer, defendant violated the legal and ethical concepts which delineated his duties to the estate.
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> . . . .
>
> In the light of defendant's duty to the insured, we hold as a matter of law defendant's conduct under the circumstances of the particular case violated the general standards of professional care which required him to use such skill, prudence and diligence in the settlement of the claim against the estate as lawyers of ordinary skill and capacity would have commonly used in the performance of like task.[92]

The court remanded the case for trial on the factual question of whether the attorney's negligence was the proximate cause of the failure to obtain a fair settlement or whether Allstate would have caused such a result even if the attorney had not been negligent.

As the above example indicates, in representing both an insurer and insured, situations may arise in which there is a conflict of interest between the clients, and by acting as attorney for both, an attorney may be liable for negligence unless he makes a full disclosure of the situation and adequately represents the insured. Similar liability may be incurred by representing both parties in a divorce action[93] or by representing both a debtor and creditor.[94] Thus, an attorney should exercise caution in attempting to serve two masters.

Gordon Baird

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[92] *Id.,* 65 Cal. Rptr. at 416-17.

[93] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[94] Lowall v. Groman, 180 Pa. 532, 37 A. 98 (1897).

LAY OPINION TESTIMONY IN MISSISSIPPI

I. Introduction

Few rules of evidence have served as effectively to baffle witnesses and confuse juries as the opinion rule. The doctrine is deceptively simple to state: "The normal function of a witness is to state facts, and not opinions. . . . The general rule is that the opinion evidence is not admissible."[1] In application, however, the rule is riddled with exceptions, confusion, and misunderstanding. The result is hopeless disharmony in decisions concerning the admissibility of opinion evidence.[2]

Originally the opinion rule was aimed at insuring the testimonial competence of witnesses. It is an ancient principle that a witness is required to testify from his personal observation and knowledge,[3] and the opinion rule prohibited testimony of surmise or conjecture. Since its inception, however, the rule has undergone a transformation; now some authors have stated that "any opinion of a witness invades the province of the jury."[4]

To fully understand the opinion doctrine it is necessary to examine the history of the rule and its evolution. Further, any study of the rule today must consist primarily of a study of its numerous exceptions. It is the purpose of this paper to review the theory and development of the opinion rule and to attempt to clarify the rules of admissibility of lay opinion testimony in Mississippi.

II. History of the Opinion Rule

In the early days of the jury trial, jurors were selected who had knowledge of the parties and facts of the lawsuit. Upon this personal knowledge the jurors based their verdict.[5] As sworn witnesses emerged upon the scene, however, the requirement of personal observation arose.[6] Emphasizing the impropriety of one who speaks solely from hearsay, it was held that a witness could testify only to that which he had seen and heard.[7] Wigmore suggests that it was this principle of personal observation to which Lord Coke referred in his classic dictum of 1622: "It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself.' "[8] Lord Mansfield addressed himself to the same problem in 1766 when he stated in *Carter v. Boehm*,[9] "It is mere opinion, which is not evidence."[10]

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[1] T. McElroy, Mississippi Evidence § 34, at 154 (1955) [hereinafter cited as McElroy].

[2] Bush, Trial Procedure Materials, in D. Louisell, Cases and Materials on Evidence 547 (1968) [hereinafter cited as Louisell].

[3] J. Thayer, Evidence at the Common Law 524 (1898).

[4] McElroy, *supra* note 1, § 34, at 154.

[5] Bush, Trial Procedure Materials, in Louisell, *supra* note 2, at 546.

[6] 7 J. Wigmore, Evidence § 1917, at 2 (3d ed. 1940) [hereinafter cited as Wigmore].

[7] Bush, Trial Procedure Materials, in Louisell, *supra* note 2, at 546.

The rule excluding opinions had a meaning for Lord Mansfield and his colleagues of 1766 different from that which it bears today. This difference is in part a result of the evolution of word meanings. In eighteenth century England the word "opinion" carried an implication of "lack of grounds" similar to our word "notion." In the United States today "opinion" has come to denote an inference or conclusion without the implication that it necessarily lacks support or is ill-founded.[11] Wigmore states that when the English and early American judges disparaged "mere opinion" they never had in mind the case of the lay witness who had fact-knowledge and included in his testimony an opinion based on that knowledge. They referred, instead, to the case in which the witness had no knowledge of the facts and thus was actually in no better position than the jury to state an opinion.[12] It was not until the nineteenth century that the rule excluding inferences by witnesses possessing personal knowledge developed.[13]

The precise reason for the evolution of the meaning of the opinion rule is unclear. Some writers attribute the change to "careless usage," which caused the concept to be passed along that "opinion is not evidence."[14] Wigmore calls the change the logical "technical development of a misunderstood term."[15] Others suggest that the confusion surrounding the rule is caused by the inherent ambiguity of the word "opinion."[16] According to Learned Hand the change probably came about as a result of the "gradual recognition by successive judges of the advantage of curtailing the trial and simplifying the issue by leaving out redundant matter."[17]

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[8] Adams v. Canon, Dyer 53b (1622), in 7 WIGMORE, *supra* note 6, § 1917, at 2.

[9] 97 Eng. Rep. 1162 (1766).

[10] *Id.* at 1168.

[11] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 21 (1954) [hereinafter cited as MCCORMICK]. "In the old sense, 'opinion'—more correctly, 'mere opinion'—is a guess, a belief without good grounds; in the modern sense, 'opinion' is an inference from observed and communicable data." 7 WIGMORE, *supra* note 6, § 1917, at 10.

[12] 7 WIGMORE, *supra* note 6, § 1917, at 8.

[13] MCCORMICK, *supra* note 11, at 21.

[14] 7 WIGMORE, *supra* note 6, § 1917, at 8.

[15] *Id.* § 1929, at 26.

[16] MCCORMICK, *supra* note 11, at 22.

[17] Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 HARV. L. REV. 40, 44 (1901).

Whatever the reason for its evolution, the opinion rule today is generally misunderstood and is the cause of widespread confusion. In decisions as to the admissibility of opinion evidence, one finds "diametrically opposed rulings on identical states of fact."[18] While in some courts opinion evidence is being admitted in cases where it was previously excluded, the majority of courts still apply the opinion rule "illiberally and inconsistently."[19] In Mississippi, as in most jurisdictions, there is a great need for clarification and liberalization of this perplexing rule of evidence.

III. THEORY OF THE OPINION RULE

The reason generally stated for a rule barring opinion testimony is that such testimony "usurps the function" or "invades the province" of the jury.[20] According to Wigmore this theory is erroneous and should be repudiated entirely.[21] Espousing a doctrine that has since been adopted by other legal writers,[22] Wigmore said that the phrase "usurps the function of the jury" implies a moral impropriety or a tactical unfairness in allowing the witness to state his opinion.[23] This implication, he says, is entirely unfounded. A witness, when he states an opinion, is not trying to usurp the function of the jury, nor could he do so even if he wished. The jury is not bound to accept the opinion of a witness and may reject it unless satisfied that the witness is credible and his opinion reasonable. The theory that opinion testimony "invades the province" of the jury is merely an attempt to justify the rule.

The true theory of the opinion rule is the exclusion of superfluous evidence.[24] Whenever the conclusion or inference may be drawn by the jury as well as by the witness, the testimony of the witness's opinion is superfluous. It is of no value to the jury.[25] Thus viewed, the opinion rule is a rule of expediency and convenience.

Other legal writers emphasize the concept of utility to the trier of fact in the application of the opinion rule.[26] Opinion testimony, according to these authorities, should be excluded only when its value is out-weighed by the substantial danger of misleading or confusing the jury.[27] The utility principle was recognized in the Proposed Federal Rules of Evidence.[28] Rule 701 states that opinion testimony by a lay witness should be admissible only when the opinion is (a) rationally based on the perception of the witness, and (b) *helpful to a clear understanding of his testimony or the determination of a fact in issue.*[29]

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[18] BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 2, at 547.

[19] Comment, *Expert and Opinion Evidence,* 14 MO. L. REV. 294, 295 (1949).

[20] MCELROY, *supra* note 1, § 34, at 154.

[21] 7 WIGMORE, *supra* note 6, § 1920, at 17.

[22] MCCORMICK, *supra* note 11, at 26; Fisch, *Lay Opinions in New York,* 37 CORNELL L. REV. 32 (1951); Note, *Opinion Evidence on the Issues Before the Jury,* 16 N.C.L. REV. 180 (1938).

[23] 7 WIGMORE, *supra* note 6, § 1920, at 17.

[24] *Id.* § 1918, at 10.

[25] *Id.*

[26] MCCORMICK, *supra* note 11, at 23.

The concepts of utility to the jury and the exclusion of superfluous evidence were clearly combined when the Supreme Court of Alaska found that "[t]he purpose of opinion testimony is to aid the jury in arriving at the truth, and if the testimony does not furnish such aid it should be dispensed with because it is not needed."[30]

The opinion rule has long been the subject of frequent and severe attacks by legal authorities.[31] The most frequently cited objection is that witnesses, when told to state facts and not opinions, become baffled and confused. Their testimony as a result is often misleading and inaccurate.[32] McCormick calls the rule "the clumsiest of all the tools furnished the judge for regulating the examination of witnesses."[33] The rule is clumsy because its basic premise is wrong. Based on the assumption that "facts" and "opinions" stand in contrast and are readily distinguishable, the opinion rule is founded upon error.[34] Every statement is subjective, and no matter how specific, detailed, and factual it may be, it is in some measure "the product of inference and reflection as well as observation and memory."[35] To illustrate this point McCormick uses two sentences: "He was driving on the left-hand side of the road" and "He was driving carelessly."[36] The difference between the former statement, a so-called "fact," and the later "opinion" is not a difference between contrasting absolutes. Instead, it is "merely a difference between a more concrete and specific form of descriptive statement and a less specific and concrete form . . . a mere difference in degree with no recognizable line to mark the boundary."[37] The rule barring opinions may best be understood as a rule of preference which favors the concrete over the abstract.

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[27] *Id.* at 26.

[28] PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (1971 Rev. Draft).

[29] *Id.*, rule 701, at 88 (emphasis added).

[30] Meyst v. East Fifth Ave. Serv., 401 P.2d 430, 438 (Alas. 1965).

[31] MCCORMICK, *supra* note 11, at 22; 7 WIGMORE, *supra* note 6, § 1929, at 27; Fisch, *supra* note 22, at 34; McCormick, *Opinion Evidence in Iowa,* 19 DRAKE L. REV. 245 (1970); Comment, *Opinion Evidence in Connecticut,* 24 CONN. BAR J. 436 (1950).

[32] United States v. Cotter, 60 F.2d 689 (2d Cir. 1930), *cert. denied,* 287 U.S. 666 (1932).

[33] MCCORMICK, *supra* note 11, at 22.

[34] *Id.*

[35] *Id.*

[36] *Id.*

An opinion may not be admitted when it concerns the ultimate fact in issue.[38] This statement is probably an extension of the general rule that a witness should not be allowed to give an opinion as to how the case should be decided.[39] The reason advanced for the ultimate issue rule, like that for the opinion rule itself, is that the testimony invades the province of the jury.[40] Testimony of an opinion on the ultimate issue, however, invades the province of the jury no more than does testimony of an eye-witness to a decisive fact. In either case the evidence is conclusive only if the jury is satisfied of the witness's trustworthiness.

The purpose of the opinion testimony, however, may well have an effect on the degree of concreteness required. The nearer the questions approach the hub of the issue, the more careful the court may become to require details instead of inferences. "Evidence on the very point in issue would seem to be of the highest pertinency,"[41] and a strict application of the rule barring opinions on the ultimate issue would lead to "the absurd result that admissibility varies in inverse proportion to relevancy."[42] This fact is recognized in the Proposed Federal Rules of Evidence and California's Annotated Evidence Code where the ultimate issue rule is abolished.[43]

IV. Exceptions to the Rule

Any discussion of the opinion rule must necessarily include a study of its numerous exceptions. As the rule evolved, a distinct line was eventually drawn: witnesses testified to the facts, and from these facts the jury made inferences and deductions. No sooner was this rule firmly established than its first exception arose. Some evidence was of such a complex and technical nature that the jury was not capable of understanding it. A jury of laymen was unable to draw the correct inferences and conclusions from the facts presented.[44] Thus, for reasons of necessity, the *expert* was allowed to state his opinion when properly qualified. Expert testimony remains one of the most frequently employed exceptions to the opinion rule.[45]

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[37] *Id.*

[38] *Id.* at 25.

[39] *Id.*

[40] *Id.* at 26.

[41] Note, *Opinion Evidence on the Issues Before the Jury, supra* note 22, at 183.

[42] *Id.*

[43] Cal. Evid. Code § 805 (West 1967); Prop. Fed. R. Evid., *supra* note 28, rule 704, at 91 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

[44] McCormick, *Opinion Evidence in Iowa, supra* note 31, at 246.

While the guidelines governing the admissibility of expert testimony have become relatively well-defined, the same is not true of lay opinion testimony. The historical development of the rule has lead to confusion and disharmony. In early America the excessively strict applicaton of the lay opinion rule was found to obstruct and delay justice,[46] and various courts attempted to alleviate the situation by creating specific exceptions to admit lay opinion testimony. Lay witnesses were eventually allowed to give their opinions concerning matters of mental condition,[47] physical condition and health,[48] age,[49] identity,[50] and handwriting,[51] as well as in matters of value,[52] speed,[53] and various other issues.[54] Today the exceptions to the rule are so numerous that "the original rule against opinions has evolved into a rule conditionally approving them."[55]

Although the lay exceptions arose haphazardly rather than pursuant to any general theory, they fall into several broad categories. Lay witnesses are often permitted to testify to what are technically opinions or conclusions when their knowledge of the matter is derived from the application of one or more of the five senses – sight, hearing, taste, smell and touch.[56] Thus, a lay witness may be permitted to testify concerning one's age, physical appearance, apparent racial origin, or resemblance. Lay opinion testimony has also been held admissible in "non-expert state of mind evidence."[57] Testimony of the lay witness may be admitted to show the sanity or insanity of a testator even though such testimony will necessarily include opinions.

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[45] The subject of expert opinion testimony is beyond the scope of this article. It has been the subject of numerous writings in legal periodicals during the last few years. *See, e.g.*, Adam, *Expert Medical Testimony in Mississippi*, 40 MISS. L.J. 241 (1969); Note, *Admissibility of Expert Opinion Testimony in Motor Vehicle Accident Cases*, 39 MISS. L.J. 317 (1968).

[46] While the original opinion rule arose under the English common law, the exclusion of lay opinion testimony, according to Wigmore, is a peculiarly American doctrine. English courts today avoid problems of opinion testimony with a liberal policy concerning its admission. 7 WIGMORE, *supra* note 6, § 1917, at 8.

[47] Gathings v. Howard, 122 Miss. 355, 84 So. 240 (1920).

[48] Columbian Mut. Life Ins. Co. v. Gunn, 173 Miss. 897, 163 So. 454 (1935).

[49] Messina v. New York Life Ins. Co., 173 Miss. 387, 161 So. 462 (1935).

[50] Mathison v. State, 87 Miss. 739, 40 So. 801 (1906).

[51] Western Union Tel. Co. v. Goodman, 166 Miss. 782, 146 So. 128 (1933).

[52] Town of Union v. J.R. Buchwalter Lumber Co., 136 Miss. 414, 101 So. 561 (1924).

[53] Perez v. Fayard, 64 F.2d 667 (5th Cir. 1933).

[54] MCELROY, *supra* note 1, § 35, at 160.

[55] McCormick, *Opinion Evidence in Iowa, supra* note 31, at 245.

[56] BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 31, at 250.

[57] McCormick, *Opinion Evidence in Iowa, supra* note 31, at 250.

A third area in which opinion testimony by a lay witness has been admitted involves those cases in which the courts have accepted limited practical experience in ordinary situations as expert qualification.[58] Thus, in cases involving the value of property, the speed of vehicles, or the meaning of business jargon, one who is actually a layman may be permitted to express his opinion.

The most frequently cited exception to the rule barring lay opinion testimony, like the exception for expert testimony, stems from necessity. There are often conditions or events which are not susceptible to reproduction by a detailed description. The witness may find it impossible to separate the facts from his conclusions and to detail all the pertinent facts in such a way as to enable the jury to form a conclusion. In such a case the witness may be permitted to state his inferences or opinions.[59] By employing this necessary sort of "verbal shorthand" or "shorthand rendering of fact,"[60] he utilizes the only available means of conveying his observations to the jury.

V. THE OPINION RULE IN MISSISSIPPI

The opinion rule is well entrenched in Mississippil law. In the 1831 case of *Torrance v. Hurst*,[61] the Mississippi Supreme Court stated that "impressions, and opinions, and inducements and faint recollections are not legal evidence."[62] By 1859 the court had made clear the rule that witnesses "must state facts and circumstances, and leave the jury to draw conclusions and inferences from those facts."[63]

As stated before, McElroy offers as the primary reason for the rule the theory that any opinion by a witness invades the province of the jury.[64] A thorough perusal of the Mississippi cases on the subject however, reveals that the court has at times looked deeper into the issue than McElroy suggests. While the decisions on the subject may not be uniform, the Mississippi Supreme Court seems to have an understanding of the basic problem of opinion testimony which, though hazy and uncrystalized, reaches nearer the very core of the issue than one may first believe. "Necessity, in a general sense, lies at the foundation of the opinion rule," the court has stated, "and when the necessity for opinions no longer exists, opinions are ordinarily no longer admissible."[65]

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[58] BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 2, at 547.

[59] MCELROY, *supra* note 1, § 35, at 160.

[60] McCormick, *Opinion Evidence in Iowa*, *supra* note 31, at 248.

[61] 1 Miss. (Walker) 403 (1831).

[62] *Id.* at 404-05.

[63] Dunlap v. Hearn, 37 Miss. 471, 475 (1859).

[64] MCELROY, *supra* note 1, § 34, at 154.

In *Illinois Central Railroad Co. v. Williams,*[66] a 1961 death case involving a collision between the defendant's moving freight train and the automobile of the decedent, the court, without expressly stating that it was so doing, applied Wigmore's theory of the exclusion of superfluous evidence and McCormick's utility to the trier of fact principle. It was held by the court that testimony of a city police captain as to his opinion of the unusually dangerous condition at a crossing should have been excluded:

> Where the facts can be produced and presented to the jury or other trier of facts by direct evidence, in such a manner that they can have an adequate basis for formulation of their own decision, without extraneous assistance, opinion evidence (such as that here) should not be admitted. . . . If the facts cannot be presented or communicated, opinion evidence may be received.[67]

The true criterion of the admissibility of opinion evidence, stated the court, is whether the jury will receive appreciable help from the witness.[68]

The rule that a witness may testify as to facts which he observed, but not to his opinion of what happened, is regularly employed to exclude the testimony of police officers as to the point of impact in automobile collision cases.[69] The officer who arrives on the scene after the collision has taken place may testify as to the location upon his arrival of vehicles, persons, skid marks, and debris, and he may mark these things on a map or diagram. It is improper, however, for him to give his opinion as to the point of impact or who was at fault.[70] The exclusion of his opinions on these matters does not deprive the jury of any helpful aid to its own powers of deduction. The testimony is simply unnecessary.

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[65] Messina v. New York Life Ins. Co., 173 Miss. 378, 390, 161 So. 462, 464 (1935).

[66] 242 Miss. 586, 135 So. 2d 831 (1961).

[67] *Id.* at 606-07, 135 So. 2d at 839.

[68] *Id.* The Mississippi Supreme Court has followed this same theory of utility in in regard to expert opinion testimony. In the *Williams* case the court stated that testimony by an expert should be admissible when "the jurors themselves are not capable, from want of experience or knowledge of the subject, of drawing correct conclusions from the facts." *Id.* at 607, 135 So. 2d at 840. Where, on the other hand, the opinion is on a common matter such as whether or not a hole in the sidewalk is dangerous, the testimony will be excluded since "the ordinary witness can add no special knowledge to that possessed by the jury." Ming v. City of Jackson, 202 Miss. 260, 267, 31 So. 2d 900, 901 (1947). The jury in such a case is as capable of forming the correct opinion from the facts as is the witness. Louisville, N.O. & T.R.R. v. Natchez, J. & C.R.R., 67 Miss. 399, 7 So. 350 (1890).

In Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 148 So. 2d 693 (1963), the court excluded the testimony of an "expert accidentologist" as to his opinion concerning the responsibility for an automobile collision. The court said that there is nothing complicated about intersectional collision of two vehicles. The facts could be presented in such a manner as to enable the jury to form their own opinion and the expert's testimony was unnecessary.

[69] *See, e.g.,* Jones v. Welford, 215 So. 2d 240 (Miss. 1968); Schumpert v. Watson, 241 Miss. 199, 129 So. 2d 627 (1961).

Necessity is also the basis for the most frequently cited exception to the lay opinion rule in Mississippi. Where it is impractical or impossible for the witness to detail all the facts in such a way as to enable the jury to form an opinion, lay opinion testimony is admissible for "it is the only method of conveying to the jury the effect on his mind of what was observed by him."[71]

The Mississippi Supreme Court has recognized and applied this "collective statement of fact" principle to age in *Messina v. New York Life Insurance Co.*,[72] and physical pain and injuries in *Dennis v. Prisock.*[73] In any case, the *necessity* for the witness's opinion must always be shown before the opinion is admissible.

In addition to the necessity requirement, in Mississippi there is the additional requirement that the witness have *knowledge* of the facts upon which he bases his opinion.[74] In the case of an expert, hypothetical questions may be substituted for first-hand knowledge, but the same is not true of the non-expert witness. The lay witness must base his opinion upon facts of which he has personal knowledge and he must state, so far as he can, a detailed enumeration of these facts before giving his opinion.[75] Once he has stated as many facts as is practical, he may testify as to his opinion concerning mental condition and capacity,[76] speed of a car,[77] identity,[78] handwriting,[79] value,[80] or numerous other matters.[81]

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[70] Lynch v. Suthoff, 220 So. 2d 593, 597 (Miss. 1969). In Standard Oil Co. v. Crane, 199 Miss. 69, 23 So. 2d 297 (1945), testimony of the officer as to the point of impact was held properly excluded. The court stated that it did not decide whether the witness, who was a member of the State Highway Patrol, was an expert in interpreting signs of collisions. Whether he was an expert or not, the exclusion of his opinion "deprived the jury of no helpful aid to its own powers of deduction." *Id.* at 80, 23 So. 2d at 299.

[71] McElroy, *supra* note 1, § 35, at 160.

[72] 173 Miss. 378, 161 So. 462 (1935). The Mississippi rule regarding opinions as to age was set forth in *Messina*:

> When a rough approximation of the age of a person is sufficient for the purpose of a particular inquiry, so that, for instance, a variation of five to ten years from the true age would not be material, it is the general practice in the interest of time and economy of effort to allow witnesses to answer to the age as a matter of opinion; and even when the very nearly exact age is the subject under investigation, opinion evidence is admissible, under the rule of necessity, when no better and no higher class of evidence is practicably obtainable in the particular case. [*Id.* at 389, 161 So. at 464].

[73] 221 So. 2d 706 (Miss. 1969).

[74] Illinois Cent. R.R. v. Williams, 242 Miss. 586, 135 So. 2d 831 (1961). "Ordinarily a witness must confine his testimony to matters within his own knowledge." *Id.* at 607, 135 So. 2d at 840.

The facual knowledge requirement has been stressed in cases involving the issues of sanity and land values. The rule is well settled in this state that a lay witness may state his opinion as to the sanity or insanity of a person, but the witness must have had an opportunity to observe the person and must have some first-hand knowledge on which to formulate his opinion.[82] The lay opinion cannot be based on an abstract hypothetical question,[83] nor can the non-expert witness be allowed to project his opinion as to the mental condition at a future time.[84] His opinion must be based upon his own knowledge of the facts and must be limited to the impressions made at the time of his observation.[85]

In the 1967 case of *Mississippi Power Co. v. Walters,*[86] the Mississippi Supreme Court stated its first-hand knowledge requirement concerning opinion testimony on the issue of land values:

> [W]e have heretofore held that a man does not have to be an expert in land values in order to testify with reference to damages as occasioned by the condemnation of land with which he is familiar. However. . . it is. . . incumbent upon that person. . . that he is familiar with the land involved and acquainted with the uses to which the land has been put and the monetary benefits derived therefrom.[87]

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[75] Ward v. Ward, 124 Miss. 697, 87 So. 153 (1921); Torrance v. Hurst, 1 Miss. (Walker) 403 (1831).

[76] Gathings v. Howard, 122 Miss. 355, 84 So. 240 (1920).

[77] Perez v. Fayard, 64 F.2d 667 (5th Cir. 1933).

[78] Mathison v. State, 87 Miss. 739, 40 So. 801 (1906).

[79] Southern Express Co. v. Thornton, 41 Miss. 216 (1866).

[80] Town of Union v. J.R. Buckwalter Lumber Co., 136 Miss. 414, 101 So. 561 (1924).

[81] McELROY, *supra* note 1, § 35, at 160.

[82] Hickey v. Anderson, 210 Miss. 455, 49 So. 2d 713 (1951); Wood v. State, 58 Miss. 741 (1881).

[83] *In re* Prine, 208 So. 2d 187, 190 (Miss. 1968).

[84] *Id.*

[85] *Id.*

[86] 204 So. 2d 471 (Miss. 1967).

[87] *Id.* at 476.

In earlier years the court admitted opinion testimony as to land value by calling the witness with first hand knowledge an "expert witness." As pointed out in *Pearl River Valley Water Supply District v. Wood,*[88] however, "this is a misnomer, for no peculiar ability or specialized training is required to testify as to the market value of property."[89] The requirement is simply that the lay witness have *personal knowledge* of the land and its use.[90]

The third requirement for the admission of opinion evidence in Mississippi is that the witness be competent to correctly form the opinion he offers. In the case of the expert witness this competence is determined by his qualifications as an expert. As a result of his knowledge and experience in a certain area he is considered competent to answer hypothetical questions concerning the suit or to form opinions based on his first-hand knowledge. The lay witness, too, must be competent to form the opinion he offers. Matters about which lay witnesses are competent to form opinions, however, include only those "about which all men have more or less knowledge according to their mental capacity and habits of observation. They are matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action."[91] Lay opinion testimony is thus admissible in cases involving issues of insanity or intoxication because these are matters about which normal people correctly draw conclusions and form opinions.

One aspect of the opinion doctrine which has frequently been the topic of discussion by the Mississippi Supreme Court is the ultimate issue rule. The court has often spoken of an invasion of the "exclusive province of the jury" with regard to the ultimate issue in the case.[92] "The verdict should express the jury's own independent conclusion from the facts and circumstances in evidence, and not be the echo of the opinions of witnesses, perhaps not unbiased.[93] But the court has gone further to say that a substitution of the conclusion of a witness for that of the jury may be avoided by requiring the "best reasonably attainable evidence of those facts" upon which the jury is to base its conclusion.[94]

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[88] 252 Miss. 580, 172 So. 2d 196 (1965).

[89] *Id.* at 598, 172 So. 2d at 204.

[90] *Id.* The knowledge requirement is also pointed out in cases involving the value of objects other than land. In National Bank v. Gorenflo, 173 Miss. 646, 655, 160 So. 911, 914 (1935), the court stated: "A witness may give his opinion as to values [of stock] after stating the basis therefor where he has sufficient facts upon which to base his opinion."

[91] Hutson v. Continental Cas. Co., 142 Miss. 388, 395, 107 So. 520, 522 (1926).

[92] *See, e.g.,* Harris v. Pounds, 185 Miss. 688, 187 So. 891 (1939).

[93] *Id.* at 697-98, 187 So. at 894.

In Mississippi, as in every state, the rules governing the admissibility of lay opinion testimony are confused and irrational. There has never been the single case in which these rules are clearly defined. Instead, the court has grasped at different facets of the opinion problem when faced with different situations. An overview of the cases reveals a general understanding of the theory of the doctrine, but the rules have never been effectively expressed. According to McCormick, "good sense demands that the trial judge be accorded a wide range of discretion" in the admission of opinion evidence,[95] and McElroy says that in Mississippi the judge has this discretion.[96] What is lacking, though, is a concise statement of guidelines to aid him in the exercise of his discretion.

It is submitted that the cases in Mississippi sustain a three-part test for the admissibility of lay opinion testimony. First, the opinion must be *necessary* as an aid to the jury. This requirement is the basis of the old exceptions to the opinion rule for "shorthand renderings of fact" and impressions which are incapable of being set forth as facts alone. Second, the witness must have *first-hand knowledge* of the facts upon which he basis his opinion. The lay opinion may not be based on hearsay. Third, the opinion must be the type that a lay witness is *competent* to form, *i.e.,* it must be that kind of opinion which normal people constantly and correctly make.

VI. CONCLUSION

As is every rule of law, the opinion rule is the product of an evolutionary process. The rule has lost some of its potency through the years and the judicial process of defining and enlarging the rule has rendered it less effective today than in the past. The doctrine has been riddled with so many exceptions that some authors say it is no longer a valid rule.[97] McCormick calls today's lay opinion rule not a rule of exclusion, but one of preference,[98] and Wigmore predicts that it will eventually disappear entirely.[99] Today's change in attitude towards the admission of opinion evidence indicates an increased confidence in the capacity and ability of modern jurors to understand and evaluate the evidence.

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[94] *Id.* at 698, 187 So. at 895.

[95] McCORMICK, *supra* note 11, at 22.

[96] McELROY, *supra* note 1, § 35, at 160.

[97] McCormick, *Opinion Evidence in Iowa, supra* note 31, at 273.

[98] McCORMICK, *supra* note 11, at 23.

[99] WIGMORE, *supra* note 6, § 1929, at 26.

The opinion rule remains active in Mississippi, however, and is still the cause of headaches for lawyers and witnesses alike. It is the contention of the author that the three-phase test suggested, requiring the showing of (1) necessity, (2) knowledge, and (3) competence, would clear the air concerning the admissibility of lay opinion testimony and would replace the confusing situation which exists today with a concise, collective statement of what the Mississippi Supreme Court has been saying for one hundred and fifty years.

Richard T. Phillips

RECENT DECISIONS

ANTITRUST EXEMPTIONS — PROFESSIONAL BASEBALL'S IMMUNITY FROM ANTITRUST REGULATION UPHELD

Flood, a professional baseball player, after being traded to another club without his consent, asked Kuhn, the Commissioner of Baseball,[1] to make him a free agent, thereby placing him at liberty to negotiate with any other major league team. Kuhn, relying on the reserve system,[2] denied his request. Flood then instituted an action in federal district court alleging that the reserve system violated federal antitrust laws.[3] The district court[4] upheld the position of Kuhn and other defendants[5] and denied the petitioner's claims. The appeals court affirmed this decision.[6] On certiorari to the United States Supreme Court, *held,* affirmed. The long-standing antitrust exemption which baseball and its reserve clause have enjoyed is entitled to the benefit of stare decisis and the removal of any inconsistencies or the indication of any remedies is for congressional, not judicial, action. *Flood v. Kuhn,* 407 U.S. 258 (1972).

The first organized baseball game was played in the summer of 1846. The years that followed saw the sport become a highly organized structure with professional baseball as its highest achievement. The first antitrust challenge to baseball came in 1922 in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.*[7] The

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[1] The Commissioner of Baseball has the sole power to approve contracts, trades, and other dealings among players and clubs in major league baseball.

[2] The reserve system was placed in baseball contracts in 1887. *See* Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 202-04 (C.C.S.D.N.Y. 1890). The reserve system binds a player for the remainder of his career to the club with which he first signs; yet, the club has the right to confine the player under the system, to assign his contract, and to renew the contract unilaterally, subject to a stated salary minimum. *See generally* P. GREGORY, THE BASEBALL PLAYER, AN ECONOMIC STUDY 19 (1956); 2 H. SEYMOUR, BASEBALL 420 (1971); Eckler, *Baseball—Sport or Commerce?,* 17 U. CHI. L. REV. 56 (1949); Neville, *Baseball and the Antitrust Laws,* 16 FORDHAM L. REV. 208 (1947); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws,* 62 YALE L.J. 576 (1953).

[3] The complaint charged violations of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964); the Clayton Act, 29 U.S.C. § 52 (1964) (federal antitrust laws); 18 U.S.C. §§ 1581, 1584 (1964); the Anti-Peonage Act, 42 U.S.C. § 1994 (1964) (federal civil rights laws); the thirteenth amendment; the Norris-La Guardia Act, 29 U.S.C. §§ 102, 103 (1964) (federal labor law); and the common law and state antitrust and civil rights laws of the various states where major league baseball is played. Flood v. Kuhn, 309 F. Supp. 793, 801-08 (S.D.N.Y. 1970).

[4] Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970).

[5] The other defendants, though not all were named in each cause of action, were the presidents of the two major leagues and the twenty-four major league clubs. *Id.* at 272.

[6] Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971).

[7] 259 U.S. 200 (1922).

Supreme Court noted that professional baseball was a business, but held that it was purely a state affair, and that the traveling of fans interstate to see a game and the movement of ball clubs across state lines were merely incidental and not essential to the business; therefore, professional baseball was not subject to federal antitrust laws. *Federal Baseball* was later cited several times by various members of the Court without disfavor.[8] In 1953 in *Toolson v. New York Yankees, Inc.,*[9] the Court cited *Federal Baseball* as controlling and held that professional baseball was not within the scope of antitrust laws. The Court found that Congress's awareness of the antitrust exemption and refusal to act, coupled with baseball's reliance on the exemption, and the potential retroactive effect of overruling *Federal Baseball* were factors which dictated that any remedy or correction should be made through legislation. The Court reaffirmed *Federal Baseball* in 1955 in *United States v. Shubert*[10] and *United States v. International Boxing Club.*[11] In 1957, however, in *Radovich v. National Football League,*[12] the Court held professional football subject to the federal antitrust laws and specifically limited *Federal Baseball* to the business of organized professional baseball. The Court further stated that if it were considering the question of baseball for the first time, baseball would be held subject to the antitrust laws.[13] The trend to hold all professional sports other than baseball subject to the federal antitrust laws continued in 1971 in *Haywood v. National Basketball Association*[14] and *Denver Rockets v. All-Pro Management, Inc.,*[15] where the Supreme Court and a federal appeals court, respectively, held that professional basketball was not exempt from federal antitrust regulation.

In the instant case the Supreme Court, after detailing the history of baseball and compiling virtually every pertinent writing and related case, found that baseball is a business engaged in interstate commerce. With its reserve system enjoying exemption from the federal antitrust laws, baseball has been an "exception," an "anomaly," and an "aberration,"[16] but it has been an established aberration recognized in all cases involving antitrust claims in professional sports.[17] The Court declared that any unrealism, inconsistency, or illogic found in distinguishing baseball from other sports was justified by the continued reliance upon *Federal Baseball* and the "positive inaction"[18] of Congress in allowing baseball's exempt status to continue.[19] The Court summarily dismissed all other claims[20] and, citing *Toolson,* held:

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[8] United States v. Employing Plasterers Ass'n, 347 U.S. 186, 196-97 (1954) (Minton, J., dissenting); North Am. Co. v. Securities & Exch. Comm'n, 327 U.S. 686, 694 (1946); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 573 (1944) (Stone, C.J., dissenting); Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923).

[9] 346 U.S. 356 (1953).

[10] 348 U.S. 222 (1955). In reaffirming *Federal Baseball* the Court adhered to that case only to the extent that the decision determined that Congress had no intention of including baseball in the scope of the federal antitrust laws. *Id.* at 230. Actually the Court in *Federal Baseball* never made any reference to Congressional intent concerning baseball's relationship to the federal antitrust laws.

[11] 348 U.S. 236 (1955). This decision limited *Federal Baseball* by stating that it "did not hold that all businesses based on professional sports were outside the scope of the antitrust laws." *Id.* at 243.

[12] 352 U.S. 445 (1957).

[13] *Id.* at 452.

[14] 401 U.S. 1204 (1971).

[15] 325 F. Supp. 1049 (C.D. Cal. 1971).

> Without reexamination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.[21]

By reenforcing the admittedly undistinguishable exemption granted to professional baseball, the Supreme Court stands in direct opposition to the current trend that all professional sports are to be governed by the federal antitrust laws.[22] While the Court recognizes that the reserve system places restraints on trade and denies a player the right to seek employment from more than one employer, the actual effect of the decision is to securely entrench baseball's reserve clause and to substantially guarantee the team owners' control over the players.[23] The decision is the latest in a line of decisions which have upheld baseball's exemption from antitrust regulation. The thoroughness of the Court's opinion creates an apparently impermeable judicial wall around baseball's antitrust exemption. The Court once again calls for legislative action in the area, but Congress has chosen not to act despite frequent opportunities to do so.[24] The resulting dilemma is that both the judiciary and the legislature refuse to take affirmative action in an area where antitrust violations abound. The ultimate irony of the decision is that the Court now asks the legislative arm of government to slay a monster created by the judicial branch.[25] Perhaps Congress, realizing that *Flood* in essence seals the judicial avenue to abolishing baseball's reserve system, will finally act to remove this illogical exemption from antitrust regulation. Yet it is highly unlikely that the negative stimulus of *Flood* will spur positive activity in Congress.[26]

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[16] 407 U.S. at 282. These are the words used by the Court in describing the exemption.

[17] Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) and Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (Basketball); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied,* 385 U.S. 846 (1966) (Golf); Peto v. Madison Square Garden Corp., 1958 Trade Cases 69, 106 (S.D.N.Y. 1958) (Hockey); Radovich v. National Football League, 352 U.S. 445 (1957) (Football); United States v. International Boxing Club, 348 U.S. 236 (1955) (Boxing).

[18] 407 U.S. at 283. Over fifty bills have been introduced in Congress concerning the relationship of baseball to the antitrust laws without Congress passing any of the bills. *Id.* at 281.

[19] There were two dissenting opinions by Justices Douglas and Marshall, both joined by Justice Brennan. Justice Douglas, who was on the Court when *Toolson* was decided, said he has "lived to regret" the decision. He stated that Congressional inaction should not prevent the Court from correcting its own fundamental error. *Id.* at 286-87. Justice Marshall contended that Congressional refusal to exempt other sports showed disapproval of the Court's decisions in regard to baseball. He suggested that collective bargaining and federal labor statutes may pre-empt the application of federal antitrust laws. *Id.* at 294-95. *See* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage,* 81 YALE L.J. 1 (1971). There was also a concurring opinion by Chief Justice Burger in which he stated that Congressional inaction was not a solid base upon which to decide a case, but felt it to be the least undesirable. He called for action by Congress upon the baseball exemption. 407 U.S. at 286.

[20] The Court found that state antitrust laws were precluded by application of the commerce clause. The Court found it unnecessary to consider other additional claims and arguments due to the decision reached by the Court. 407 U.S. at 284-85.

[21] *Id.* at 285.

[22] *See* note 18 *supra.*

Should Congress fail to take prompt action, the door will be effectively closed to athletes wishing to escape the baseball reserve clause. The closing of this door could lead to the opening of another — application of federal labor laws to professional baseball and other professional sports. This area has yet to be explored, but some interest has arisen.[27] The development of labor unions in professional sports through which players bargain collectively and have the power to strike illustrates the use of labor tactics by players. When a group avails itself of labor tactics, it is not without merit to argue that labor laws should apply to the group's activities. Should federal laws be found applicable, federal antitrust laws would become irrelevant as applied to professional baseball. As the players are forced to use collective bargaining to compete with the powers of the owners, more aspects of labor relations and unions will develop. As a result, the professional athlete's future and the future of all professional sports could easily be governed by federal labor laws instead of federal antitrust laws.

Julian Fagan

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[23] *See generally* P. GREGORY, *supra* note 2; Eckler, *supra* note 2; Neville, *supra* note 2; Comment, *Monopsony in Manpower, supra* note 2; 25 MISS. L.J. 270 (1954).

[24] 407 U.S. at 285.

[25] In deciding *Federal Baseball* the Court found that baseball was not engaged in interstate commerce, and therefore it was not subject to regulation under the federal antitrust laws. Thirty years later in *Toolson* the Court recognized the changes in baseball but said it was for Congress to subject baseball to antitrust regulation. In the instant case the Supreme Court admits baseball is a business and is engaged in interstate commerce. The Court concedes that baseball would be held subject to antitrust regulations were it not for the reliance of baseball upon the *Federal Baseball* and *Toolson* decisions. In effect the Court admits its mistake and says it would decide differently today on a clean slate, but refuses to correct its own error.

[26] *See* note 19 *supra.*

[27] *See* Flood v. Kuhn, 407 U.S. at 294-95; Jacobs & Winter, *supra* note 19.

CHURCH PROPERTY — MISSISSIPPI STATUTES WHICH AUTHORIZED CIVIL COURTS TO RESOLVE INTERNAL CHURCH PROPERTY DISPUTES ARE DECLARED UNCONSTITUTIONAL

A dispute between appellants[1] and appelles[2] over control of church properties in Jackson, Mississippi, arose when appellants decided to transfer appellee Williams, the pastor of the local congregation, to another church.[3] Williams refused to move and a majority of the local members supported his staying as their pastor.[4] Appellants then filed suit in chancery court claiming title to the church property[5] and sought to enjoin appellees from occupying it. Appellees answered[6] and relying upon sections 1273-01 and 1273-02 of the Mississippi Code,[7] alleged that they were entitled to an injunction to prevent appellants from interfering with their use of the property. The chancellor rejected appellants' constitutional challenge to these sections and awarded the property to the appellees.[8] On appeal to the Mississippi Supreme Court, *held*, reversed. Where statutes authorize a majority of beneficiaries of a religious trust to divest the mother church of church property without regard to the habendum clause of the deed, and where those statutes authorize the court to determine if there is a "deep-seated disagreement" between a local and parent church, and where those statutes permit the court to appoint trustees of the church property, they violate article 3, section 18 of the Mississippi Constitution and the first amendment to the United States Constitution. *Sustar v. Williams,* 263 So. 2d 537 (Miss. 1972).

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[1] State Overseer, H.D. Sustar, and other officials of the General Church of God with headquarters in Cleveland, Tennessee.

The organizational structure of the Church of God is hierarchical, *i.e.,* it is governed by a national body constituted of representatives from the various local churches. A General Overseer and a General Assembly appoint State Overseers and State Trustees of property. The State Overseer appoints the pastors of local churches. Each local church is a member of the General Church and is governed by it. This hierarchical structure is in contrast to the congregational form of government which allows each local church to be autonomous. *See* Note, *Judicial Intervention In Disputes Over The Use of Church Property,* 75 HARV. L. REV. 1142, 1143-44 (1962) [hereinafter cited as *Judicial Intervention*].

[2] David Williams, pastor of the local church, and a majority of the local church members.

[3] Appellant Sustar claimed that he had been informed by telephone that pastor Williams would be shot unless he were moved.

[4] Nearly all of the local members signed a letter written to the General Overseer requesting Williams to stay and defying the parent church's authority to move him. Subsequently appellant Sustar read to the congregation a proclamation which disqualified the church as a member of the mother church and declared the property vacant.

[5] A copy of the deed was attached to the petition with the following habendum clause:

> To have and to hold unto the said . . . Local Board of Trustees . . . subject above to the following limitations: The said Local Board of Trustees shall hold title to, manage and control the said real estate for the general use and benefit of the Church of God, having its general headquarters in Cleveland, Tennessee, and for the particular use and benefit of the local congregation. . . . If at anytime the Local Board . . . shall cease to exist or to perform its duties, then the State Overseer . . . shall have the power to declare all offices on the said Board vacant, and the State Board . . . shall automatically hold title. [Sustar v. Williams, 263 So. 2d 537, 538-39 (1972)].

[6] The chancellor allowed a majority of the local members to intervene in the litigation as beneficiaries of a religious trust. They alleged that by constituting at least a two-thirds majority of the congregation who had determined that a "deep-seated and irreconcilable hostility" existed between themselves and the mother church,

Standards to be employed in church property disputes were first articulated by the United States Supreme Court in *Watson v. Jones.*[9] *Watson* established a rule that in a hierarchical polity, civil courts must accept as final the ruling of the highest church tribunal to which the matter was carried in questions of ecclesiastical doctrine or polity.[10] Subsequent decisions have elevated this rule to constitutional status.[11] In contrast to the *Watson* line of cases, there had been imbedded in the common law a departure-from-doctrine standard of the implied trust

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they were entitled to an injunction preventing appellants from interfering with the property under the authority of MISS. CODE ANN. §§ 1273-01, -02 (Supp. 1971).

[7] Section 1273-01 defines local beneficiaries as those residing in Mississippi who contributed all or part of the corpus of the trust and who locally and directly enjoy the benefits of the trust. This section defines a majority as 66⅔ percent. MISS. CODE ANN. § 1273-01 (Supp. 1971). Section 1273-02 permits this majority to exercise control over the trust when they and the chancery court determine that "a deep-seated and irreconcilable hostility" exists between them and any others in control of the trust. The court can discharge all in control and appoint other trustees with complete control over the property. MISS. CODE ANN. § 1273-02 (Supp. 1971).

[8] Appellants' plea in bar charging that these statutes were unconstitutional was overruled.

[9] 80 U.S. (13 Wall.) 679 (1871). For exhaustive treatments of the significance of *Watson, see* Comment, *Judicial Intervention In Church Property Disputes—Some Constitutional Considerations,* 74 YALE L.J. 1113 (1965); *Judicial Intervention, supra* note 1.

[10] 80 U.S. (13 Wall.) at 727. *Watson* set forth three categories in which civil courts could resolve church property disputes. First, where the church, according to to the express terms of the instrument whereby it receives the property, is devoted to a specific doctrine, the court would see that the property was held to its intended use. Second, where the property is held by a church of congregational policy where no express trust is attached, the majority vote will determine the property use. Finally, the highest church adjudicatory in a hierarchical polity must control. *Id.* at 722-27.

[11] Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952). *Watson* had been decided before the first amendment was made applicable to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

rule.[12] The implied trust rule impresses a trust on property contributed to a church in favor of the fundamental doctrines held by the church at the time the contributions were made.[13] According to the departure-from-doctrine standard, in a dispute concerning the control of church property centering on claims of departure from the fundamental doctrines, civil courts will determine which faction is faithful to the trust and award the property to that group.[14] However, the Supreme Court struck down the departure-from-doctrine element of the implied trust rule as violating the first amendment in *Presbyterian Church v. Hull Memorial Presbyterian Church*[15] and established *Watson*[16] as the constitutional standard.[17] The Court said that since the departure-from-doctrine element of the implied trust rule requires an interpretation of the doctrine, it violates the first amendment command that civil courts decide church property disputes without resolving controversies of religious doctrine and practice.[18] On remand the Georgia Supreme Court ruled in favor of the local congregations, basing its decision on a determination of the legal title to the property.[19] Relying upon the Court's invalidation of Georgia's departure-from-doctrine element of the implied trust theory, the Georgia Supreme Court held that the entire implied trust theory must fall, thereby giving legal title of the property to the local congregations according to neutral property law.[20] The United States Supreme Court denied a petition for a writ of certiorari and allowed the decision to stand.[21] On the same day the Court refused to consider a Maryland Court of Appeals decision in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,*[22] where Justice Brennan, in concurring comments, said that a state may adopt any one of at least three approaches for settling church property disputes so long as it does not consider doctrinal matters. First, states may use the *Watson*[23] approach if the appropriate church governing body can be determined apart from resolving questions of doctrine and polity.[24] A second approach, according to Justice Brennan, is to employ neutral principles of property law which would resolve litigation by studying deeds, reverter clauses, and general state corporation clauses.[25] The third approach is the passage of special statutes to govern control of church property which would preclude state interference with church doctrine and polity.[26] The opinion cited *Northside Bible Church v. Goodson*[27] as an example of statutes which would violate the principle of non-interference.[28] In *Goodson* an Alabama statute,[29] similar to Mississippi's sections 1273-01 and 1273-02,[30] was found to be unconstitutional. Despite the existence of this constitutionally suspect statute, the Mississippi case law in this area[31] is not significantly inconsistent with the rule and policy later established in *Hull*[32] and clarified in *Eldership*.[33]

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[12] Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case,* 1969 SUP. CT. REV. 347, 349-50 [hereinafter cited as Kauper].

[13] *Id.* In the case of a hierarchical form of church government the trust would be in favor of the mother church. *See* Dusenberg, *Jurisdiction of Civil Courts over Religious Issues,* 20 OHIO ST. L.J. 508 (1959); 22 VAND. L. REV. 674, 676-77 (1969).

[14] Kauper, *supra* note 12, at 350. This rule is usually attributed to Lord Eldon's opinion in Attorney General v. Pearson, 36 Eng. Rep. 135 (Ch. 1817), which committed the English courts to a policy of determining questions of religious doctrine where property rights were in issue. Kauper, *supra* note 12, at 350.

[15] 393 U.S. 440 (1969).

[16] 80 U.S. (13 Wall.) 679 (1871).

[17] 393 U.S. at 447-52.

[18] *Id.* at 449-50.

[19] Presbyterian Church v. Hull Memorial Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969).

[20] Jenkins, *Ownership of Church Property and the Doctrine of Implied Trusts,* 22 MERCER L. REV. 515, 519 (1971). *Hull* had held that neutral property principles could settle church property disputes as an alternative to the *Watson* approach so long as civil courts are not required to settle doctrinal issues. Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

[21] Presbyterian Church v. Hull Memorial Presbyterian Church, 396 U.S. 1041 (1970), *denying cert. to* 225 Ga. 259, 167 S.E.2d 658 (1969).

[22] 396 U.S. 367, 368 (1970) (appeal dismissed). For a discussion of this case, *see* Note, *Presbyterian Church v. Hull Memorial Presbyterian Church — Supreme*

After reviewing earlier decisions,[34] the Mississippi Supreme Court concluded in the case at bar that sections 1273-01 and 1273-02 of the

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Court's Pronouncements Against a Civil Court's Determination of Church Doctrine in Property Disputes, 42 Miss. L.J. 276, 283 (1971) [hereinafter cited as *Presbyterian Church*].

[23] 80 U.S. (13 Wall.) 679 (1971).

[24] 396 U.S. at 370. Justice Brennan commented in a footnote that states following the *Watson* approach would have to find another ground for decision when identification of the relevant church governing body is impossible apart from considering church doctrine or polity. *Id.*

[25] *Id.* Justice Brennan indicated, however, that if the application of the "formal title" doctrine requires courts to resolve religious questions, this doctrine may not be used in such cases.

[26] *Id.*

[27] 261 F. Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

[28] 396 U.S. at 368.

[29] Ala. Code Ann. tit. 58, §§ 104-13 (Cum. Supp. 1969). This statute provided that 65 percent of the members of a local church could sever ties with the general church, nullify the trust clause of the deed made to the general church, and take the property.

[30] Miss. Code App. §§ 1273-01, -02 (Supp. 1971).

[31] For a discussion of and citations to this line of cases, *see Presbyterian Church*, *supra* note 22, at 286.

[32] 393 U.S. 440 (1969).

[33] 396 U.S. 367 (1970).

[34] The court reviewed its holding in Linton v. Flowers, 230 Miss. 838, 94 So. 2d 615 (1957), and then reviewed the holdings of the Supreme Court in Maryland and Virginia Eldership v. Church of God, 396 U.S. 367 (1970), and Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), which were based on Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960), Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), and Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). The court then reviewed the holding of the Fifth Circuit Court of

Mississippi Code were unconstitutional. Recognizing that *Hull*[35] held neutral property principles to be determinative of church property disputes when doctrine is not involved and noting that *Eldership*[36] directed the deed by which the church obtained the property to control its use if the deed limits the use by "express terms," the court found the statute to be unconstitutional since it permitted a majority of the beneficiaries of a religious trust to divest the mother church of property without regard to the habendum clause of the deed. Relying further upon the *Hull* requirement that a civil court could not decide the use of church property where the issue was based upon an interpretation of doctrine, the court further found the statute to be violative of article 3, section 18 of the Mississippi Constitution[37] and the first amendment to the United States Constitution[38] because it allowed courts to determine "deep-seated disagreements" regarding church doctrine. The court further found that the statute permitting the courts to appoint trustees of church property is unconstitutional, since it would constantly subject the courts to involvement in church disputes. Justice Robertson, in a specially concurring opinion, relied on *Goodson*[39] and found that since the statute would allow a two-thirds majority of the local congregation to come into civil court and cancel a solemn covenant of a recorded deed which sets forth an express trust in favor of the general church it is unconstitutional for that reason alone.[40]

The present decision eliminates an anomalous statutory provision. Sections 1273-01 and 1273-02 stood in conflict with Mississippi's case law,[41] and the first litigation of record under their authority has rendered them invalid. The sections authorized an undesirable state intrusion into religious matters by permitting courts to enter the obscure realm of church dogma to determine questions which are outside their area of expertise. Even though the decision works a hardship on those local churches which develop deep-seated disagreements with parent churches, it seems appropriate that these sections should fall. When local church members buy and work to construct church properties, it is arguable that they should be allowed to withdraw from the mother church

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Appeals in Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967), and the holding of the Alabama Supreme Court in First Methodist Church of Union Springs v. Scott, 284 Ala. 571, 226 So. 2d 632 (1969).

[35] 393 U.S. 440 (1968).

[36] 396 U.S. 367 (1970).

[37] MISS. CONST. art. 3, § 18.

[38] U.S. CONST. amend. I.

[39] 387 F.2d 534 (5th Cir. 1967).

[40] Justice Robertson was of the opinion that section 1273-03 was part and parcel of sections 1273-01, -02 and should fall with them even though it was not mentioned in the majority opinion. This section gives to the chancery court having jurisdiction of a removal of trustees proceeding "the full powers of a court of equity, competent to adjudicate any and all matters incidental to or collateral to the principle cause." MISS. CODE ANN. § 1273-03 (Supp. 1971).

[41] *See, e.g., Presbyterian Church, supra* note 22, at 286.

if they so choose,[42] retaining and using the property to worship God according to their own consciences. On the other hand, to permit local churches to withdraw and take property from the parent church on a majority vote can only weaken the effectiveness of churches organized according to hierarchical structures and eventually destroy that form of government.[43] Religious associations must have some degree of authority to enforce ecclesiastical decisions upon local churches who voluntarily associate with them.[44] If a local church affiliates with and uses the name of a larger church organization, the local members should reasonably expect to follow the doctrine and policy of the larger group.[45] Courts should not intercede to support one side where parties have previously agreed that the general church would be authoritative.[46] The propriety of the hierarchical form of church government is a question, not for the civil courts, but for laymen and clergymen to decide within the church.[47] The position taken by the instant court is consistent with the American tradition of religious liberty and will properly leave the determination of the ownership and use of church properties to the highest church tribunal where there is a hierarchical form of church government.

William L. Youngblood

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[42] Jenkins, *supra* note 20, at 521.

[43] *Id.*

[44] Note, *Constitutional Law — Judicial Intervention In Church Property Disputes,* 44 Tul. L. Rev. 370, 376 (1970). This article quoted *Watson*:

> All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Watson v. Jones,* 80 U.S. (13 Wall.) 679, 729 (1871)].

[45] *Id.*

[46] *Id.*

[47] Jenkins, *supra* note 20, at 521.

CONSTITUTIONAL LAW — ABORTION — STATUTE PROHIBITING ABORTION VIOLATES WOMEN'S CONSTITUTIONAL RIGHT OF PRIVACY

Plaintiffs[1] filed a petition in federal district court requesting a declaratory judgment that the New Jersey abortion statute[2] and related statutes[3] were unconstitutional and sought to enjoin their operation and enforcement.[4] Plaintiffs contended that the statutes violate the right of privacy of women in choosing whether to bear a child or terminate a pregnancy.[5] Plaintiffs further contended that this right of privacy includes the right to seek the services of physicians to perform abortions and that the challenged statutes violate the right of privacy in the physician-patient relationship as guaranteed by the ninth and fourteenth amendments. The state asserted that the statutes are justified for the protection of society's interest in regulation abortion.[6] The three-judge federal district court,[7] *held,* judgment for the plaintiffs but injunctive relief denied.[8] Women have a constitutional right to seek an abortion, and where a state statute prohibits abortion without "lawful justification," that statute is unconstitutionally vague; and where state statutes provide for possible sanctions against a physician for performing a criminal abortion, these statutes violate the right of privacy in the physician-patient relationship. *Y.W.C.A. v. Kugler,* 342 F. Supp. 1048 (D.N.J. 1972).[9]

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[1] Plaintiffs were nine physicians who filed the petition for themselves and on behalf of their women patients.

[2] N.J. REV. STAT. § 2A:87-1 (1951), which provides:

> Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.
>
> If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

[3] N.J. STAT. ANN. § 45:9-16 (Supp. 1972), which provides, in part, that the State Board of Medical Examiners may suspend or revoke the license to practice medicine of any physician who practices criminal abortion or who has been convicted of the crime and criminal abortion. *See also* N.J. REV. STAT. §§ 2A:87-2: 170-76 (1951).

[4] Two of the plaintiff-physicians had been prosecuted under the challenged statutes and had suffered revocation of their licenses. These two plaintiffs sought the expunction of criminal records resulting from their convictions under the statutes and the reinstatement of their medical licenses.

[5] Plaintiffs also contended that the phrase "without lawful justification" provides inadequate notice of the sphere of conduct prohibited by the statute and that the statute is, therefore, unconstitutionally vague on its face. N.J. REV. STAT. § 2A:87-1 (1951).

[6] The state asserted that its interest in regulating abortions arises from the power of the state to regulate conduct inimical to the general welfare and the concept of protection of the embryo or fetus.

[7] *See* 28 U.S.C. §§ 2281, 2284 (1970).

[8] The court also held that prayers for the expunction of the criminal records and the return of the medical licenses of the two plaintiff-physicians seeking relief "verged" on injunctive relief. Therefore, this relief was also denied.

Under Roman law abortion with the consent of the father was legal. The concept underlying this early law was the hypothesis that a fetus is a part of the woman.[10] At common law abortion prior to quickening[11] of the embryo was not a criminal offense.[12] However, legislation was enacted as early as 1803 which placed legal restrictions on all abortions.[13] Eventually all states enacted legislation prohibiting abortions. The majority of states, however, subsequently liberalized their abortion statutes to allow abortions when necessary to preserve the life of the mother.[14] In 1891 the United States Supreme Court first recognized a fundamental right of privacy not specifically enumerated in the Bill of Rights.[15] Since that time subsequent decisions of that court and of the lower courts have continually expanded that right. In *Meyer v. Nebraska*[16] the Court held that the fourteenth amendment encompassed a right to marry, establish a home, and bring up children. The Court recognized a constitutional right to procreation in *Skinner v. Oklahoma*

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[9] This decision actually encompassed two cases, Y.W.C.A. v. Kugler, and Abramowitz v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), which were consolidated for hearing. All plaintiffs in *Abramowitz* and those in *Y.W.C.A.* who brought suit as individuals and on behalf of organizations which they claimed to represent were held to lack standing to sue.

[10] 48 J. URBAN L. 969, 970 (1971).

[11] The period of the unquickened fetus runs from conception to the sixteenth or eighteenth week of pregnancy. Quickening is marked by interuterine movements of the fetus perceived by the mother. STEDMAN'S MEDICAL DICTIONARY 1340-41 (21st ed. 1966).

[12] 48 J. URBAN L. 969, 970 (1971). The author states, however, that abortion after quickening was a misdemeanor at common law; *cf.* Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?,* 17 N.Y.L.F. 335, 373 (1971) [hereinafter cited as Means], which states that during the late seventeenth, the entire eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints in regard to the termination of unwanted pregnancies at any time during gestation.

[13] 48 J. URBAN L. 969, 971 (1971), which states that England passed such legislation in 1803. *See also* Comment, 20 AM. U. L. REV. 136, 140 (1970), which states that in 1821 Connecticut enacted the first statute in the United States prohibiting abortions.

[14] Comment, 20 AM. U. L. REV. 136, 140 (1970).

[15] Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (plaintiff was held to have a right to the "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

[16] 262 U.S. 390 (1923).

ex rel. Williamson.[17] In *Griswold v. Connecticut*[18] the Court first articulated the theory that the ninth amendment could contain fundamental rights not enumerated in the first eight amendments to the Constitution.[19] In that case a statute which made it a criminal offense for any person to use any drug, medicinal article or instrument for the purpose of preventing conception was held unconstitutional as an unreasonable interference with the right of marital privacy. Since the time of the decision in *Griswold,* there has been a line of cases, beginning with *People v. Belous,*[20] in which state abortion statutes have been challenged as unconstitutional infringements upon a woman's fundamental right to terminate an unwanted pregnancy and upon the fundamental right to obtain the aid of a physician to perform the service.

In the present case the court first considered the constitutionality of the challenged phrase "without lawful justification" and found it to be unconstitutionally vague on its face.[21] The court reviewed the history and development of the fundamental right of privacy in matters related to marriage, sex, childbearing, childrearing and education, and analyzed recent lower court decisions which have expanded the scope of this right. The court concluded that a woman has a constitutional right of privacy cognizable under the ninth and fourteenth amendments to determine whether to bear a child or to terminate a pregnancy in its early stages. This right can be intruded upon by the state only if there is a compelling state interest which overrides the private right of the individual. The considerations of health and safety of the mother and the interest of the state in controlling sexual behaviour and population growth were held to no longer constitute compelling grounds to justify a restrictive statutory scheme in the area of abortion. The argument that the state has a compelling interest in preservation of the life of the embryo or fetus was then declared by the court to be beyond the competence of judicial resolution.[22] The court, therefore, concluded that the state did not have the requisite compelling interest to override a woman's right of privacy to choose whether to bear a child or to terminate a pregnancy in its early stages. The court further concluded that since women have a constitutional right to seek an abortion, it necessarily follows that performance of such services by physicians cannot be prohibited by the statutes in question.

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[17] 316 U.S. 535 (1942).

[18] 381 U.S. 479 (1965).

[19] 2 TEX. TECH L. REV. 99, 100 (1970).

[20] 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), in which the court held that "[t]he fundamental right of the woman to choose whether to bear children follows from the [United States] Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

[21] The court concluded that the New Jersey abortion statute, N.J. REV. STAT. § 2A:87-1 (1951), chills and deters the plaintiff-physicians in the exercise of protected first amendment activities; and that it violates plaintiff-physicians' rights under the fourteenth amendment to freely practice the profession of their choice. Judge Garth, however, in a dissenting opinion found no distinguishing characteristic between the New Jersey abortion statute as interpreted by the Supreme Court of New Jersey and the statute held to be constitutionally definite by the United States Supreme Court in United States v. Vuitch, 402 U.S. 62 (1971). 342 F. Supp. at 1066-67.

[22] Judge Garth, in his dissenting opinion, concludes that the state has a compelling interest in the preservation of life, including fetal life; therefore, the

The present case is another decision in a growing trend which recognizes a woman's fundamental right to terminate an unwanted pregnancy. The abortion statutes of the majority of states have been criticized as unreasonable infringements upon a woman's fundamental right to plan the size of her family and to avoid the birth of a deformed child or a child who is the product of incest or rape. Therefore, those statutes have been denounced as risking the physical and mental well being of a woman by forcing her to carry a pregnancy to term.[23] Any statute designed to regulate the procurement of abortions must restrict its scope to compelling state interests.[24] The issue which must be resolved in the area of abortion law is that of determining what constitutes a compelling state interest. All authorities recognize a compelling state interest in insuring that all abortions are performed by competent persons in adequate surroundings. The court in the present case and the courts of other jurisdictions have relied primarily upon the legislative history of abortion statutes in holding them to be unconstitutional. These courts and other authorities state that the sole legislative purpose behind abortion statutes was the protection of pregnant women from the dangers imposed by medical conditions prevailing at the time such statutes were enacted.[25] At the time states began enacting legislation restricting abortion, the danger to the life of a woman who obtained an abortion was ten to fifteen times greater than that to the life of a woman who gave birth at full term.[26] Under modern medical conditions, however, the danger to the life of a woman who gives birth at full term is eight times the danger to the life of a woman who obtains an abortion.[27] Many authorities therefore conclude that the nineteenth century abortion laws no longer effectuate their original purpose, but, in fact, actually frustrate that purpose. These authorities conclude that this frustration of legislative purpose renders abortion statutes unconstitutional.[28] Nevertheless, other courts have been unwilling to resolve the problem on the issue of legislative purpose.[29] Perhaps the most controversial problem that continues to arise in cases challenging the constitutionality of abortion statutes is balancing the

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statute in issue was held by him not to interfere unconstitutionally with the fundamental right of a woman to choose whether to bear children or to terminate a pregnancy. 342 F. Supp. at 1082.

[23] 48 J. URBAN L. 969, 977 (1971).

[24] Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).

[25] Means, *supra* note 12, at 336.

[26] *Id.* at 383.

[27] *Id.* at 387.

[28] People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).

[29] *See, e.g.,* Means, *supra* note 12.

rights of the mother against the rights of the fetus. It is clear that a woman's right to life has always taken precedence over any interest the state may have in the unborn.[30] When the mother's life is not in danger, however, the courts are divided on this issue. Many courts have been unwilling to hold that the fetus has any rights during the early stages of pregnancy. Recent judicial decisions[31] and legislative enactments appear to be returning to the concept of quickening as the stage of pregnancy in which the fetus acquires rights.[32] Other courts have held that the embryo or fetus has rights from the moment of conception.[33] These courts conclude that there is a compelling state interest in the protection of the life of such embryo or fetus. The rights of the fetus, of course, must be weighed against those of the mother. Therefore, statutes prohibiting abortions, except those abortions necessary to preserve the life of the mother, have been held by some courts not to infringe upon the rights of the mother. The controversy which has arisen under present abortion statutes can best be resolved by legislation, rather than judicial proceedings. The legislatures of all states should consider these issues and enact legislation setting forth with specificity the respective rights of the fetus and of the mother.

Lawrence E. Allison, Jr.

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[30] *See, e.g.,* cases cited note 33 *infra.*

[31] *See, e.g.,* Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).

[32] Comment, 20 AM. U. L. REV. 136, 148 (1970). *See also* Means, *supra* note 12, at 403, which observes that "[t]here is no evidence that the framers of the Constitution and the Bill of Rights intended that a fetus be considered to be a 'person' within the meaning of the Constitution and the Bill of Rights."

[33] *See, e.g.,* Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

CONSTITUTIONAL LAW — ADDITUR IS PERMISSIBLE UNLESS TRIAL COURT MANIFESTLY ABUSES ITS DISCRETION

Thorn, a forty-two year old traveling salesman, sued Biloxi Electric Company for personal injuries arising out of an automobile accident in which his automobile was struck from the rear. The jury returned a verdict of $6,500.00 in favor of Thorn, who thereupon moved the court for a new trial, claiming inadequacy of damages.[1] The trial court found the verdict to be inadequate and contrary to the overwhelming weight of the credible evidence and, in addition, that bias, prejudice, or passion on the part of the jury had influenced the judgment. The court, acting under the provisions of section 1686.5 of the Mississippi Code,[2] entered an order providing that unless an additur[3] was accepted increasing the amount of the judgment to $12,500.00, a new trial limited to the issue of damages would be granted. Biloxi Electric Company refused to accept the additur order, and the trial court thereupon ordered the new trial. The company appealed contending that the trial court had manifestly abused its discretion in the ordering of the new trial.[4] On appeal to the Supreme Court of Mississippi, *held,* reversed and judgment of $6,500.00 reinstated. A trial court may, in a proper case, enter an additur order under section 1686.5 of the Mississippi Code; but where a new trial is ordered after the refusal of an additur, the Mississippi Supreme Court will reverse if it can be shown that the trial court manifestly abused its discretion. *Biloxi Electric Co., Inc. v. Thorn,* 264 So. 2d 404 (Miss. 1972).

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[1] MISS. CODE ANN. § 1536 (1956) provides:

> Every new trial granted shall be on such terms as the court shall direct; and no more than two new trials shall be granted to the same party in any cause. Provided, however, that when the sole ground for a new trial is the excessiveness or inadequacy of damages assessed, the party aggrieved may elect to appeal from the order granting a new trial.

[2] MISS. CODE ANN. § 1686.5 (Supp. 1971), as originally passed by the legislature in 1971, and under which this case was decided, provided:

> The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only.

This section was amended during the 1972 session of the legislature and the following provision was added:

> If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

[3] Additur or increscitur, as it has also been described, is the power of a court, on motion for a new trial due to inadequate damages rendered by jury verdict, to require the defendant to consent to an increase in the award to a stipulated amount as a condition for denial of the motion for a new trial. *See generally* Comment, *Statutory Authorization of Additur and Remittitur,* 43 MISS L.J. 107 (1972).

Mississippi has long recognized that a trial court has the power to enter a remittitur order, *i.e.,* to condition the denial of a motion for a new trial due to excessive damages upon the plaintiff's consent to a remission in the award to a specified amount.[5] Remittitur has repeatedly been approved in cases involving unliquidated or disputed damages.[6] However, the status of additur in Mississippi, as elsewhere, has been the subject of much controversy.[7] The practice of additur in federal courts in actions involving unliquidated damages was held by the United States Supreme Court in *Dimick v. Schiedt*[8] to be unconstitutional as it deprives the plaintiff of his right to trial by jury[9] under the seventh amendment to the United States Constitution.[10] Initially, a trial court in Mississippi had no authority to add to or increase the amount of a verdict returned by a jury. Such action was deemed an invasion of the province of the jury.[11] In 1922, however, the Mississippi Supreme Court began a gradual retreat from this position when it allowed a trial judge to assess damages in the amount for which suit was brought after a jury had returned a verdict in general terms and failed to mention the amount of their verdict in favor of the plaintiff.[12] Subsequently, the court began to formulate the position that in order to show the true amount due, a trial court could add to or increase a jury's verdict where the damages sought were either liquidated, undisputed, or capable of determination by mathematical calculation and computation.[13] In *Woodmansee v. Garrett,*[14] decided in 1963, the Mississippi Supreme Court considered the question of extending the authority of a trial court to increase the jury's verdict to cases involving unliquidated or disputed damages. Noting that such action is violative of the constitutional right to trial by jury[15] where the party prejudiced does not consent thereto, the court refused to recognize the power to increase the verdict in such cases.[16] In an effort to circumvent the *Woodmansee* rule, in 1971 the Mississippi legislature enacted section 1686.5 of the Mississippi Code which by its terms appears to be absolute so as to encompass cases in which unliquidated and disputed damages are present.[17]

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[4] As will be discussed in the text hereafter, additur, where unliquidated or disputed damages are involved, has been rejected in Mississippi. *See* Woodmansee v. Garrett, 247 Miss. 148, 153 So. 2d 812 (1963).

[5] Houston v. Page, 208 So. 2d 901 (Miss. 1968); Dennis v. Berryman, 200 So. 2d 437 (Miss. 1967); Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967); Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Capital Transp. Co. v. Segrest, 254 Miss. 168, 181 So. 2d 111 (1965); Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962); Thomas v. Fleming, 241 Miss. 26, 128 So. 2d 854 (1961); Motors Ins. Corp. v. Lenior, 218 Miss. 348, 67 So. 2d 381 (1953); Case v. Yazoo & M.V.R.R., 114 Miss. 21, 74 So. 773 (1917); Hurd v. Germany, 8 Miss. 675 (1843); Young v. Englehard & Silverberg, 2 Miss. 19 (1834).

[6] Houston v. Page, 208 So. 2d 901 (Miss. 1968); Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967); Whitten v. Land, 188 So. 2d 246 (Miss. 1966); Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962); Thomas v. Fleming, 241 Miss. 26, 128 So. 2d 854 (1961).

[7] *See generally* Comment, *Statutory Authorization of Additur and Remittitur, supra* note 3.

[8] 293 U.S. 474 (1935).

[9] The Court pointed out that the question of damages is a question of fact, and since the power to determine questions of fact lies within the province of the jury, a federal court's action of increasing an award of damages constitutes a re-examination of a fact tried by a jury and violates the seventh amendment. 293 U.S. at 486.

[10] U.S. CONST. amend. VII provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The seventh amendment has not been incorporated into the due process clause of the fourteenth amendment and is therefore not binding on the states. Comment, *Statutory Authorization of Additur and Remittitur, supra* note 3, at 112 & n.39.

In *Thorn,* the Mississippi Supreme Court primarily held that on appeal it will not upset whatever action a trial court has taken with respect to ruling on a motion for a new trial unless the trial court's action amounts to a manifest abuse of discretion.[18] The court, however, also addressed itself to section 1686.5 and its additur provisions. Noting that "[t]he power of additur is new to the courts of our State,"[19] the court concluded that the legal principals upon which remittitur and additur are based are identical.[20] In amplification of this similarity, the court reasoned that since a verdict to be deemed excessive and warrant a remittitur must be so gross as to be "flagrantly outrageous and extravagant," the same standard would apply as to whether a verdict is inadequate and warrants an additur order. Finding that the damages awarded Thorn were not so inadequate as to meet this standard, the court held that in granting the new trial the lower court had manifestly abused its discretion. The court concluded that no inference should be drawn that it unfavorably viewed the use of an additur order where the requirements of section 1686.5 are met[21] and such action serves to foster the statute's legislative purpose of relieving crowded dockets and bring litigation to an early conclusion.

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[11] Buck v. Little, 24 Miss. 463 (1852).

[12] Stone-Lowe Cotton Co. v. Weil Bros., 129 Miss. 60, 91 So. 859 (1922).

[13] City of Indianola v. Love, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956); Ruffin v. J. & M. Schwabacher, Ltd., 156 Miss. 326, 126 So. 14 (1930); Collins v. Carter, 155 Miss. 600, 125 So. 89 (1929). The formulation of this position was completed in 1963 when the Woodmansee v. Garrett, 247 Miss. 148, 153 So. 2d 812 (1963), the court announced:

> [W]e have come to the conclusion that where the amount in question is undisputed or liquidated, or the damage is fixed by law, or where the amount due may be determined by mathematical calculation, including interest, the trial court, or this Court on appeal, may add to the verdict of the jury so as to show the true amount due. [247 Miss. at 156, 153 So. 2d at 816].

[14] 247 Miss. 148, 153 So. 2d 812 (1963).

[15] Miss. Const. art. 3, § 31 provides: "The right to trial by jury shall remain inviolate."

[16] The court in *Woodmansee* apparently failed to grasp the fact that the party prejudiced in the case of additur is the defendant, not the plaintiff, when it stated:

> [T]he trial court cannot add to the verdict of the jury an additional sum as damages in unliquidated claims, nor can the trial court bind the plaintiff in a damage suit by adding to the verdict of the jury an additional award so as to circumvent the necessity of a new trial where the jury has returned an inadequate award of damages, and where a motion is made for a new trial on that ground. [247 Miss. at 157, 153 So. 2d at 816.]

[17] *See* note 2 *supra.* The phrase "case in which money damages were awarded" should reasonably be interpreted to mean all damages including disputed or unliquidated damages, in addition to those which are undisputed, liquidated, ascertainable by fixed rules of law, or determinable by mathematical calculation.

The endorsement by the Mississippi Supreme Court of the additur provisions of section 1686.5 in the present case, while completely ignoring its prior position regarding the use of additur in the trial courts of this state, serves as a basis for questioning the validity of the *Woodmansee* decision. Although the holding in *Woodmansee* requires the consent of the plaintiff to an additur order, the language of the statute providing that if the additur order "be not accepted then the court may direct a new trial on damages only" viewed in light of *Thorn*, indicates that the court may now define the term "additur" in its conventional sense[22] and require that acceptance be made only by the defendant. Since the court has now acknowledged that "[t]he legal principles involved with additur are the same as those involved with remittitur," it is inconsistant and illogical that any restriction be placed on one and not on the other. In view of this position, the court has apparently laid a foundation for a rejection of any distinction between the two concepts. As a modern device which fosters judicial efficiency and economy while retaining the essentials of the right to trial by jury,[23] the additur practice can help relieve the overcrowded dockets of the trial courts of this state. It is hoped that the present thinking of the Mississippi Supreme Court with respect to additur will continue, and when a challenge by a non-consenting plaintiff to the validity of the additur provisions of section 1686.5 is presented before it, the court will reject that challenge and overrule its mistake in *Woodmansee.*

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[18] Dendy v. City of Pascagoula, 193 So. 2d 559, 564 (Miss. 1967), *cited in* Biloxi Elec. Co., Inc. v. Thorn, 264 So. 2d 404 (Miss. 1972).

[19] 264 So. 2d 404, 405 (Miss. 1972). As indicated in the text, this statement is only partially correct. The power of additur has been allowed in Mississippi except where the damages are unliquidated or disputed.

[20] *Id.* This conclusion on the part of the court is enlightening since it ignored this common basis in Woodmansee v. Garrett, 247 Miss. 148, 153 So. 2d 812 (1963).

[21] *See* note 2 *supra.*

[22] *See* Bender, *Additur — The Power of the Trial Court to Deny a New trial on the Condition That Damages Be Increased,* 3 CALIF. W. L. REV. 1 (1967); Comment, *Statutory Authorization of Additur and Remittitur, supra* note 3.

[23] Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 427 P.2d 933, 994-95, 59 Cal. Rptr. 276, 282-83 (1967), *noted in* 8 SANTA CLARA LAW. 123 (1967).

S. T. Rayburn

CONSTITUTIONAL LAW: FREE TEXTBOOK AID TO SEGREGATED PRIVATE SCHOOLS IS CONSTITUTIONAL

Plaintiffs[1] sought a federal district court injunction which would, *inter alia,* prohibit application of a state statute[2] and related Textbook

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[1] Plaintiffs in this class action were four black students attending public school in Tunica County, Mississippi, who filed suit through their parents as next friends. Defendants were members of the Mississippi State Textbook Purchasing Board and the full-time executive secretary of that board. Board members are the governor, the state superintendent of education, and three others appointed by the governor for terms of four years. The events leading these particular plaintiffs to file suit are of more than passing interest.

On January 23, 1970, the United States District Court for the Northern District of Mississippi entered an order requiring the integration of all public schools of Tunica County, Mississippi, no later than February 2, 1970, in accordance with standards established by the United States Supreme Court in Green v. County School Bd., 391 U.S. 430 (1968), and later in Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (ordering mid-year integration). According to deposition evidence subsequently before the court, *all* white students of Tunica County then withdrew from the public schools and formed a private academy housed in church facilities. The principal and seventeen of twenty-one high school teachers of the Tunica County system resigned in mid-school-year to assume positions with the new private school, continuing to receive their salaries from the then re-segregated public school system until this practice was enjoined and restitution ordered in the United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd,* 440 F.2d 377 (5th Cir. 1971).

On December 4, 1969, shortly after the Supreme Court's decision in *Alexander v. Holmes County Bd. of Educ.,* the executive secretary of the Mississippi Textbook Purchasing Board, circulated a memorandum to "County and Separate District Superintendents" which stated:

> Subject: Textbooks for private schools
>
> We have many disturbed parents since the Court decisions. Many of them are going to organize private schools, and they are going to need books. Since all the money has been allotted for this year, it will be necessary for the superintendents to transfer books with the student as he transfers to the private school. . . .
>
> We appreciate your cooperation in this difficult situation.

In this manner, state-owned textbooks used by white students avoiding integration of Tunica County Public Schools were transferred to private segregated academies in January, 1970. Suit was filed October 8, 1970.

[2] MISS. CODE ANN. § 6656 (1952). *See generally* MISS. CODE ANN. §§ 6634, *et seq.* (1952); *Id.* §§ 6641, 6642 (Supp. 1971).

Board regulations[3] providing for the distribution and loan of free state-owned textbooks to pupils in all elementary and high schools in the state.[4] The particular practices of application challenged were the provision of free textbooks to white students attending private, racially segregated academies formed in the wake of public school desegregation. Plaintiffs claimed that the specific application of the statute was unconstitutional as a denial of equal protection under the fourteenth amendment.[5] The three-judge district court,[6] *held,* for defendants and

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[3] The board regulations for distribution of state-owned textbooks made no distinction between private and public schools from 1940 to 1970. Each county superintendent of education was required to requisition textbooks from the Textbook Purchasing Board for all schools, public and private, geographically located within his county. After approval by the board, the School Book Depository shipped books directly to the consignee specified by the county superintendent of education.

In 1970, however, Congress enacted the Emergency School Assistance Act appropriating funds to aid school districts converting to unitary systems. The act makes it unlawful for any recipient district to "engage . . . in the gift, lease or sale of real or personal property or services to a non-public elementary or secondary school or school system practicing discrimination on the basis of race, color or national origin." Pub. L. No. 91-380 (1 U.S. CODE CONG. & AD. NEWS 942-45 (1970)). As a result public school officials wishing to participate in this federal program were obliged to disassociate themselves from the private segregationist academies.

Thereafter, on October 14, 1970, six days after the instant suit was filed, the Textbook Board established new distribution regulations which eliminated county superintendents, *et al.,* as administrators for the distribution of textbooks to private academies, substituting instead, a direct relationship between the administrative heads of the private schools and the Textbook Board itself. *See* Norwood v. Harrison, 340 F. Supp. 1003, 1006-07 n.2 (N.D. Miss. 1972).

[4] The case was submitted to the district court on the basis of stipulations, depositions, briefs, and oral argument on July 9, 1971, ostensibly to resolve the issue presented before the start of school in September, 1971, since relief sought, should plaintiffs have prevailed, anticipated the recall of textbooks already in use by private academies. The instant decision, however, was not rendered until April 17, 1972.

[5] Plaintiffs claim, *inter alia,* was that the furnishing of state-owned textbooks to private, racially segregated schools and academies formed for the purpose and having the effect of providing white students with an alternative to racially integrated and otherwise non-discriminatory public schools impeded plaintiffs' right to the affirmative establishment of racially integrated public schools. Such practice, they argued, citing particularly Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), constitutes impermissible state aid and encouragement to racially segregated education.

In Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969), the court's finding of fact determined a number of private schools to be racially discriminatory. *See also* Green v. Kennedy, *supra* at 1134. Virtually all the schools so adjudged were participating in the state textbook program at the time of argument in this case, although a number had withdrawn shortly after this suit was filed, apparently to avoid possible adverse effects of the recall sought. *See* note 4 *supra.*

Plaintiffs filed an elaborate chart, "Interdependence of Public School Desegregation and Formation and Growth of Private Academies," which summarized dismissed the complaint. A state's legitimate interest in the education of all its youth is a sufficient justification for the state to administer a free textbook program, and such a program and its statutory authorization are not constitutionally invalid. *Norwood v. Harrison,* 340 F. Supp. 1003 (N.D. Miss. 1972).

It has traditionally been held permissible[7] for states[8] to provide free textbooks to pupils in public school where there is constitutional or statutory authority.[9] Nevertheless, there has been much controversy where free textbooks are furnished by the state to pupils enrolled in private schools. Where the controversy has involved parochial private schools, the first amendment establishment clause must be considered.[10] The early cases involving state aid to parochial schools[11] did not, however, involve first amendment establishment clause considerations since the Supreme Court had not yet made the first amendment applicable to the states through the fourteenth amendment.[12] The predominant theory arising out of these cases was the "child" or "pupil" benefit theory.[13] Simply stated, the theory says "that the state may extend certain welfare

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evidence contained in the stipulations and depositions before the court, and asked the court to adjudge, on a school by school basis, other private schools as being racially discriminatory and as having been formed for the purpose of providing white students with an alternative to racially integrated, non-discriminatory public schools as *Coffey* and *Green* had done. Of the 148 specifically named academies against which plaintiffs sought relief, 107 were receiving textbooks and another 41 were eligible but not participating in the state's program.

[6] Since this suit challenged the constitutionality of a statute that was applied statewide, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970). The court consisted of Judges Coleman, Keady, and Smith.

[7] Validity of this type of program has been challenged on such grounds as: (1) a violation of state law forbidding gifts of public money, or things of value to individuals; *see* Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929); (2) a taking of property without due process; *see* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); and (3) a violation of the state constitution forbidding the taxing of municipal corporations for municipal purposes; *see* MacMillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030 (1920).

[8] *See* 20 U.S.C. § 825 (1970) (federal textbook program for state elementary and secondary, public and private schools).

[9] Annot., 67 A.L.R. 1196 (1930); MISS. CODE ANN. §§ 6634, *et seq.* (1952).

[10] U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

[11] Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929).

[12] Cantwell v. Connecticut, 310 U.S. 296 (1940) (first amendment made applicable to the states by incorporation through the fourteenth amendment).

[13] Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929), was the first case to use the child benefit theory. An act of the Louisiana legislature setting aside public funds for the purchase of textbooks for all school children in the state regardless of what school they attended was upheld. *See also* 13 J. PUB. L. 76, 80 (1964).

aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional."[14] Where the theory has been rejected, either expressly or impliedly, it has been "in favor of a finding that such aid accrues to the benefit of the schools themselves, and hence of the religion or religious body maintaining the schools."[15] Again the Supreme Court was confronted with the child benefit theory in *Everson v. Board of Education,*[16] and the Court upheld a New Jersey statute[17] that allowed local school districts to set up programs for transportation of children to school, including private schools. The Court said that the legislation was a public measure enacted to improve the general welfare.[18] The child benefit theory, although not expressly mentioned by the Court in *Everson,* was obviously an essential aspect in the Court's determination.[19] In the years following the *Everson* decision, there were several state court decisions concerning state aid to parochial schools in the form of textbooks and bus transportation.[20] In most of these cases such aid was held to be violative of the respective state constitutions.[21] As these decisions and the opinion by Chief Justice Burger in *Walz v. Tax Commission*[22] point out, the law in this area was ambiguous. It was in this light that the Supreme Court decided *Board of Education v. Allen,*[23] which upheld a New York law[24] requiring the lending of free textbooks to pupils in private as well as public schools. Justice White, speaking for the Court, reaffirmed the child benefit theory by characterizing the legislation as benefitting the parent and child, not the school.[25] In the recent case of *Lemon v. Kurtzman*[26] the Court found that state aid (state reimbursements of non-public elementary and secondary schools for costs of teachers' salaries, textbooks, and instructional material) to parochial schools had gone so far as to entangle government with religion.[27] The aid, therefore, inured to the benefit of the school as opposed to the child or parent.

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[14] 13 J. PUB. L. 76, 79 (1964).

[15] Annot., 93 A.L.R.2d 986, 987 (1964). *See also* Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715 (1922); Dickman v. School Dist. No. 62c, 232 Ore. 238, 366 P.2d 533, *cert. denied.* 371 U.S. 823 (1961); Haas v. Independent School Dist., 69 S.D. 303, 9 N.W.2d 707 (1943).

[16] 330 U.S. 1 (1947). This was also the first case in which state aid to parochial schools was "measured" by the establishment clause.

[17] N.J. STAT. ANN. § 18A: 39-1 (1941).

[18] 330 U.S. 1, 18 (1947).

[19] 37 FORDHAM L. REV. 123, 125 n.22 (1968).

[20] 13 J. PUB. L. 76, 81 n.31, 87-88 nn.59 & 61 (1964).

[21] *Id.* Of the five state courts which have considered textbook aid to parochial schools in light of their state constitutions, only Mississippi has upheld such aid. Chance v. Mississippi State Textbook Rating and Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

[22] 397 U.S. 664 (1970).

[23] 392 U.S. 236 (1968).

[24] N.Y., EDUC. LAW § 701 (McKinney Supp. 1967).

[25] 392 U.S. at 243-44. *See also* 37 FORDHAM L. REV. 123, 126-27 & n.30 (1968).

[26] 403 U.S. 602 (1971).

[27] *Id.* at 614, 625.

Aid to private, non-sectarian schools, most notably those in the South, has been attacked on several grounds. Tuition grants from the state to individual parents and children have generally been held to violate the equal protection clause of the fourteenth amendment in that they have fostered the establishment of racially segregated private schools.[28] A further attack was aimed at the tax exempt status afforded these racially discriminatory private schools by the Internal Revenue Service, and as a result, these schools lost this status with the decision of *Green v. Kennedy* in 1970.[29]

The court in the present case, speaking through Circuit Judge J. P. Coleman, found that since the issuance of the free textbooks to pupils in church-related private schools is not an establishment of religion in violation of the first amendment[30] and since such a program is not direct aid to the school but to the individual student,[31] the Mississippi textbook program administered pursuant to a thirty-two year old statute[32] is not constitutionally invalid. The court refused to apply a more stringent standard to determine what constitutes aid to a private school under the fourteenth amendment than the standard presently applied under the first amendment.[33] The court, therefore, felt that the state has a legitimate interest in educating all of its youth, no matter what school they may choose to attend, and this state interest is sufficient justification for the administration of a free textbook program which includes not only public school students but all private school students.[34]

The present case, although involving an equal protection problem, was decided on the basis of principles expounded in religious cases involving the first amendment.[35] The plaintiffs had asked the court to apply a stricter standard of review in a case involving racial discrimination than has traditionally been applied in cases where the establishment of religion has been at issue. The effect of applying such a standard would be to classify what has traditionally been considered, in first amendment cases, indirect aid[36] and not entanglement[37] of government and religion as a separate standard. The fourteenth amendment standard urged would hold that when racial discrimination is involved, any state aid whatever, whether direct or indirect, is impermissible. Although the court refused to apply such a standard in this case,[38] this argument is not without precedent. In *Green v. Kennedy*[39] the court applied the strict standard of equal protection review to cases involving racial discrimination when it disallowed the tax exempt status[40] of racially discriminatory private schools in Mississippi. Churches, however, still retain their tax exempt status,[41] thereby benefitting from the application of a less stringent standard to state aid to religion.

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[28] Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969); Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp 833 (E.D. La. 1967). Compare these cases with the equal protection argument in Palmer v. Thompson, 403 U.S. 217 (1971). *See also* Note, *Palmer v. Thompson: A New Approach to Equal Protection?*, 43 Miss. L.J. 255 (1972).

[29] 309 F. Supp. 1127 (D.D.C. 1970) (federal tax benefits to racially segregated private schools disallowed). *See also* 68 Colum. L. Rev. 922 (1968).

[30] Board of Educ. v. Allen, 392 U.S. 236 (1968).

[31] Chance v. Mississippi State Textbook Rating and Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

[32] Miss. Code Ann. §§ 6634, *et seq.* (1952). Compare the age of this enactment with the ages of the enactments struck down in the cases collected in note 28 *supra.*

[33] 340 F. Supp. 1003, 1011 (1972).

[34] *Id.* at 1013.

[35] Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

The salvation of the statutory authorization involved in the present case may be that it was enacted over thirty years ago and several years before the *Brown v. Board of Education* decision.[42] This enactment, therefore, was free from racial motivation at its inception.[43] Its reasonable effect is not the support, maintenance, or establishment of racial discrimination in private schools.[44] The statute is the result of a racially neutral and benevolent policy,[45] and since all children are affected by the statute in the same manner, an equal protection argument may lose its validity. In view of the statute's neutral application to public and private schools, it may be argued that a child who elects to attend a private school should not be denied the benefits available under a public measure simply because he has made such a choice.[46] The textbook aid involved here is not the "substantial" aid to a private segregated school that has been struck down in previous cases.[47] In fact, it is doubtful that the cost of books (arguably a smaller cost than bus transportation or school tuition per pupil) would be borne by the schools in the absence of this statute. It was pointed out in *Allen*[48] that most private schools do not provide students with textbooks. Thus a financial benefit inures to the parent or child (*i.e.*, child benefit theory). The Supreme Court in

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[36] Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks held to be indirect aid to private parochial school).

[37] Lemon v. Kurtzman, 403 U.S. 602 (1971) (aid which benefitted private school excessively entangled government with religion).

[38] 340 F. Supp. 1003, 1011 (N.D. Miss. 1972).

[39] 309 F. Supp. 1127 (D.D.C. 1970).

[40] *Id.* at 1127 n.1.

[41] Walz v. Tax Comm'n, 397 U.S. 664 (1970) (held that granting of tax exemptions to religious organization did not violate the first amendment as this would be only minimal involvement between church and state).

[42] 347 U.S. 483 (1954).

[43] Norwood v. Harrison, 340 F. Supp. 1003, 1007 (N.D. Miss. 1972).

[44] Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833, 845 (E.D. La. 1967) (Louisiana legislation tuition grants were found to establish and maintain a state supported system of racially discriminatory private schools, making the state a party to such discrimination); Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (as in *Poindexter*, the legislation involved fostered the creation of private segregated schools).

[45] Judge Wisdom stated in *Poindexter* that free lunch and textbook programs were the result of a "racially neutral benevolence." 275 F. Supp. at 835.

[46] *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (held that child may attend private school as opposed to public to satisfy state compulsory attendance law).

[47] *See* Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970) (tax exempt status to private segregated schools in Mississippi disallowed); Coffey v. State Educ. Fin.

Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (Mississippi tuition grants); Poindexter v. Louisiana Fin. Assistance Comm'n 275 F. Supp. 833 (E.D. La. 1967) (Louisiana tuition grants). The court distinguished the above cases by noting the critical nature of financial support involved there as opposed to "the act of furnishing a state-owned textbook" here. 340 F. Supp. at 1012-13. It concluded that there was no showing in the instant case "that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary." 340 F. Supp. at 1013.

Such a standard would appear to impose an extremely difficulty, if not impossible, burden of proof on the plaintiffs. Neither the tuition grant nor the tax exemption cases contained or required evidence that white students would return to public schools if only tuition grants or tax benefits were withdrawn. In fact, the significant increase in size and number of private academies since those decisions obviates such a conclusion. But the court, in applying the less-strict standard of state aid under the first amendment's establishment clause, imposed at the same time an even greater burden of proof than that required in previous cases under the more-strict standard of the fourteenth amendment's equal protection clause.

Had the court applied the "financial support" emphasis it found in the tuition grant cases, however, it might have been inclined toward a different result. *Coffey* found that almost all the private segregated academies were opened without any meaningful planning and on the "thinnest financial basis." 296 F. Supp. at 1389. Of the 107 academies receiving books, deposition evidence showed that no less than nineteen were opened in obsolete and abandoned public school buildings, twenty-six in church Sunday school facilities, and seven in private homes or buildings not constructed to house educational facilities. This situation, at the very least, presents a question of whether or not these schools met the "one pre-requisite" which, for private schools to participate in the textbook program, "must be satisfied for the student who attends a private school, *i.e.*, the school shall maintain educational standards equivalent to those established by the State Department of Education for Public Schools." 340 F. Supp. at 1013. As for the "financial support" which the court might have found in "the act of furnishing a state-owned textbook," stipulation and deposition evidence in the record indicated that during the 1970-71 school year the 107 academies receiving textbooks enrolled approximately 34,500 students and held 175,000 volumes costing the state of Mississippi approximately $490,000. In addition, since the annual expenditure for new or replacement textbooks is approximately $6.00 per pupil, the annual recurring state expenditure for students in segregated academies will be roughly $207,000, exclusive of transportation and distribution costs. Including the forty-one private academies not receiving textbooks at the time of the decision, the total potential cost to the state, barring enrollment increases, would be $610,000 in initial inventories and $257,000 annually thereafter, again, exclusive of transportation and distribution costs. This potential cost to the state would average almost $5,900 per academy in initial inventory and $1,700 per academy in annual recurring expenditure.

[48] 392 U.S. 236, 244 n.6 (1968).

Cochran v. Louisiana State Board of Education[49] accurately described a statute analogous to that involved in the present case when it said:

> The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. *Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.*[50]

However, the "individual interests" and "common interest" mentioned above point out, as the district court did not, that one primary factor underlying the Supreme Court's "indirect aid" findings in establishment decisions is the recognition that parochial schools serve two functions: sectarian *and* secular.[51] State aid was found constitutional in those decisions principally because its "neutral" purpose and effect was to aid the common interest or secular functions of those schools. Aid to the sectarian function was therefore only "indirect" and, in this light, not violative of the establishment clause. The "neutral purpose" factor thus recognized in the establishment cases and relied on by the district court here is intrigingly parallel to the early distinction in equal protection cases between integration and desegregation by which states were allowed to adopt a "neutral" posture in dismantling segregated school systems.[52] That distinction, however, was subsequently overruled by the courts in the late sixties after the failure of "neutral" freedom of choice plans to effect unitary school systems:

> The Court holds that Boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary system in which there are no Negro schools and no White schools — just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.[53]

Thus, in the fourteenth amendment context and in subsequent "affirmative duty" cases,[54] the test became not whether state aid is "direct" or "substantial," but that "*any* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution."[55] Similarly, the measure of state legislation and policy in the field of education, particularly regarding school systems converting from dual to unitary operation, became the *effect* of the legislation and policy rather than its "neutral" purpose: "The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[56] Moreover, this type of analysis in equal protection cases is in evidence as early as the decision in *Cooper v. Aaron*:[57]

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[49] 281 U.S. 370 (1930). Most of the opinion consists of quotes from Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929).

[50] 281 U.S. at 375 (emphasis added).

[51] Lemon v. Kurtzman, 403 U.S. 602, 663 (1971) (White, J., concurring).

[52] *Cf.* Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination."

[53] United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir. 1967).

[54] *See* Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) (new school district may not be created where effect would be to impede dismantling of dual system); North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971) (statute tending to interfere with formulation of remedy for racial segregation held unconstitutional); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (reliance upon state's duty to form meaningful remedy for past policies and practices of segregation to uphold use of variety of techniques used to uproot an entrenched dual system);

> The constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . .

Green v. County School Bd., 391 U.S. 430 (1968) (freedom of choice struck down as state agencies charged with "affirmative" duty to take whatever steps necessary to convert to unitary system); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 869 *aff'd en banc,* 380 F. 2d 385 (5th Cir. 1967) (holding system-wide policy of integration as only adequate redress for previously overt system-wide policy of segregation). Green v. Conally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) and Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed, sub nom.* Cannon v. Green, 398 U.S. 956 (1970) (duty to affirmatively support public integrated education imposed on federal government). For underlying "affirmative duty" principle, *see* Cooper v. Aaron, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."); Brown v. South Carolina Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968), *aff'd mem.,* 393 U.S. 222 (1968) (tuition grant legislation struck down); Poindexter v. Louisiana Fin. Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd mem.,* 389 U.S. 571 (1968) (tuition grant legislation).

[55] Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1181 (E.D. Va. 1969) (striking down tuition grant plan) (emphasis in original). Justice White, concurring in Lemon v. Kurtzman, 403 U.S. 602, 671 n.2 (1971), apparently made a similar distinction between first and fourteenth amendment cases. A number of other methods of state aid in which public school properties were transferred to aid private racially segregated schools have been similarly prohibited. Wright v. City of Brighton, 441 F.2d 447 (5th Cir.), *cert. denied, sub nom.* Hoover Academy, Inc. v. Wright, 404 U.S. 915 (1971); United States v. Hinds County School Bd., 433 F.2d 598 (5th Cir. 1970); Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958). *Accord,* Anderson v. Canton Municipal Separate School Dist. and Madison County School Dist., No. 28030 (5th Cir., Dec. 22, 1969) (rule to show cause why injunction should not issue); United States v. Covington County School Dist., No. 28030 (5th Cir., Dec. 17, 1969) ("It is further ordered that the Lincoln Elementary school facility shall not be used, leased, or sold for private school purposes"); Lemon v. Bossier Parish School Board, Civil No. 10,687 (W.D. La., Sept. 25, 1970) (granting injunction against use of public schools athletic field for game between two private schools; field had been leased by Lions Club, sponsor of game).

[56] Wright v. Council of the City of Emporia, 407 U.S. 451, 462 (1972). The court further held that in judging the "effect" of the state action at issue, the correct test is "whether it hinders or furthers the process of school desegregation." *Id.* at 460.

[57] Cooper v. Aaron, 358 U.S. 1 (1958).

> can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."[58]

The district court's application of and reliance on first amendment cases in determining whether the provision of free, state-owned textbooks constitutes impermissible state aid to a private school thus precluded many, if not all, of the interesting questions which might have been reached had it applied the more stringent standard of the fourteenth amendment cases. One possible explanation for the court's reliance on establishment clause considerations might be that some of the private academies involved have names indicating church affiliation. Examination of the deposition evidence before the court, however, reveals that such schools are in fact affiliated in name only and therefore that the schools serve no strictly sectarian function, unless, of course, one such function is racial segregation. Since the instant decision relied so heavily on establishment cases, however, it seems unlikely, should the Supreme Court entertain equal protection arguments, that it will be allowed to stand.[59]

Walker W. (Bill) Jones

CORPORATE INCOME TAXATION — CORPORATION CANNOT DEDUCT LOSSES ON PROPERTY HELD FOR NON-CORPORATE PURPOSES UNDER SECTION 165 (a) IRC

In 1944 petitioner, a corporation, acquired a piece of lakefront property which was to be held for the personal use of its stockholders.[1] The property was sold at a loss in 1957.[2] Petitioner claimed the right to use the loss incurred on the sale of the property as a capital loss carryover[3] for subsequent years. The Commissioner disallowed the carryovers on the ground that a deduction for the loss on the sale of property which is not held for use in a trade or business or for the production of income is prohibited by section 165(a)[4] of the Internal Revenue Code. Petitioner contended that section 165(a) by its own terms allows a deduction of any loss incurred by a corporation.[5] On petition to the Tax Court of the United States, *held,* judgement for respondent. Deduction by a corporation of a loss suffered on the sale of nonbusiness assets is prohibited by section 165(a) of the IRC, and no capital loss carryover may be had with respect thereto. *International Trading Co. v. Commissioner,* 57 T.C. No. 46 (Dec. 28, 1971).

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[58] *Id.* at 17.

[59] Norwood v. Harrison, 340 F. Supp. 1003, *review granted,* 41 U.S.L.W. 3166 (U.S. Oct. 10, 1972) (No. 72-77). In any event, there is a need for definite guidelines by which state aid to private non-sectarian schools can be measured. If textbooks are not permissible aid, then where is the line to be drawn? For example, is state aid to such schools in the form of police and fire protection also impermissible?

[1] Petitioner acquired for $23,875.36 a 13-acre tract of land on Beaver Lake, Waukesha County, Wisconsin. During the period of September, 1944, through August, 1949, petitioner expended a total of $409,863.29 for the construction of buildings, for the acquisition of furniture, fixtures, and equipment, and for various other improvements to the lakefront property. Additional improvements were made during fiscal years ending August 31, 1950, through August 31, 1952, at a cost of $47,611.98. Petitioner received gross rental income in respect to the property from four stockholders and four affiliate companies totaling $28,850 for the period of 1948 through September, 1950.

[2] Petitioner had attempted to sell the lakefront property in 1950 and in 1951 at a price of $200,000. The property was eventually sold at public auction in June, 1957, at which time petitioner's adjusted basis was $447,167.16. A total of $144,500 was realized on the sale, thereby producing a loss of $302,667.16.

[3] *See* INT. REV. CODE of 1954, § 1212 (pertaining to capital loss carryovers).

Provisions for corporate loss deductions have long been inherent in Federal tax law.[6] In 1909 Congress imposed upon corporations an excise tax measured by net income for the privilege of doing business.[7] In computing net income the act allowed a deduction for "all losses actually sustained within the year and not compensated for by insurance or otherwise."[8] Congress, in 1913, abandoned the excise tax on the privilege of doing business and imposed a tax directly on net income.[9] The provisions of the 1913 Act relating to the deduction of losses by corporations[10] were identical to the provisions of the 1909 Act and remained essentially unchanged through the Internal Revenue Code of 1939.[11] Although the Internal Revenue Code of 1954 combined into section 165 all of the 1939 Code provisions dealing with losses, no substantive change was effected by this rearrangement.[12] Several commentators have viewed the absence of limitations on the deductability of corporate losses under section 165(a) as a presumption that all transactions entered into by a corporation are either for profit or in connection with a trade or business.[13] "A corporation is normally deemed to be engaged in a 'trade or business'; however, to the extent that it is operated solely for the pleasure or recreation of its stockholders, it is not engaged in a 'trade or business.' "[14] On several occasions, attempts by corporate taxpayers to secure deductions under section 162[15] and section 167[16] were thwarted because the property in question was not held for business purposes, but was held for the personal use of the corporations' shareholders.[17] It was soon discovered that the broad judicial[18] and administrative interpretation given to the term "ordinary and necessary" resulted in expenditures related to entertainment activities and facilities being allowed as deductions where their connection with a trade or business was quite remote. Expenditures relating to entertainment facilities met the "ordinary and necessary" test of sections 162 and 212,[19] when in reality the expenditures were ordinary and necessary only to the extent that they developed goodwill for the business.[20] With the enactment of section 274 IRC[21] in 1962, Congress imposed substantial limitations on the availability of deductions related to entertainment expenses and facilities which otherwise qualified under sections 162 and 212.[22] Under section 274(a)(1)(B) a taxpayer is not allowed a deduction with respect to an entertainment or recreational facility unless the facility is used primarily for the furtherance of the taxpayer's trade or business and the expenditure was directly related to the active conduct of such trade or business. Expenses related to an entertainment or recreational facility include depreciation, operating costs, and *losses realized on the sale or other disposition of the facility.*[23]

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[4] INT. REV. CODE of 1954, § 165 (a): "General Rule—There shall be allowed as a deduction any loss substained during the taxable year and not compensated for by insurance or otherwise."

[5] Petitioner compared the language of section 165 (a) with section 165 (c), which limits the loss deduction of individuals to losses incurred in trade or business, or in transactions entered into for profit, or to losses arising from casualty. Petitioner argues that the language of section 165 (a) is clearly stated and places no limitations on corporate losses as does section 165 (c) upon individual losses.

[6] Act of August 27, 1894, ch. 349, § 32, 28 Stat. 556, imposed a two percent tax on the net profits of income above actual operating and business expenses, including losses. The Act was declared unconstitutional in Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895).

[7] Act of August 5, 1909, ch. 6, § 38, 36 Stat. 112.

[8] *Id.* at 113.

[9] Act of October 3, 1913, ch. 16, 38 Stat. 166.

[10] *Id.* at 167 (allows a deduction for "losses actually sustained during the year, incurred in trade. . . and not compensated for by insurance or otherwise").

[11] Int. Rev. Code of 1939, ch. 1, § 23 (f), 53 Stat. 13 (now INT. REV. CODE of 1954, § 165 (a)).

[12] S. REP. No. 1622, 83d Cong., 2d Sess. 198 (1954).

[13] *See, e.g.,* B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 5.03 (3d ed. 1971); J. CHOMMIE, FEDERAL INCOME TAXATION 109 (1968); A. PARKER, DEDUCTIONS AND CREDITS 76 (rev. ed. 1967).

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[14] International Trading Co. v. Commissioner, 275 F.2d 578, 584 (7th Cir. 1960).

[15] INT. REV. CODE of 1954, § 162 (a): "In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

[16] INT. REV. CODE of 1954, § 167 (a): "General Rule—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —

(1) of property used in the trade or business, or

(2) of property held for the production of income."

[17] International Trading Co. v. Commissioner, 275 F.2d 578 (7th Cir. 1960). In 1951, 1952, and 1953 the petitioner in the principal case sought to deduct the maintenance expenses and depreciation on the Beaver Lake property because the corporation had purchased and maintained the property as an investment and for the purpose of entertaining its customers and suppliers in connection with its brewery supply business. In disallowing the deductions, the Court of Appeals stated:

> Even though the evidence shows that the taxpayer had rental income from its commercial properties in Milwaukee, and to that extent was engaged in carrying on a rental business for profit, nevertheless, as respects the Beaver Lake property, the expense of maintaining it, in view of the evidence, cannot be said to be an "ordinary" and "necessary" expense within the meaning of section 23 (a) (1) (A) [now § 162 IRC of 1954].

See also Greenspoon v. Commissioner, 229 F.2d 947 (8th Cir. 1956), where expense of maintaining sole shareholders farm as horticultural showplace was not an ordinary and necessary business expense of industrial pipe corporation, though place was used incidentally to entertain prospective customers; Black Dome Corp., 5 CCH Tax Ct. Mem. 455 (1946); Savarona Ship Corp., 1 CCH Tax Ct. Mem. 89 (1942).

[18] *See, e.g.,* Sanitary Farms Dairy, 25 T.C. 463 (1955), where the cost to a dairy of sending two of its principal officers to Africa on a big game hunt was held to be an ordinary and necessary expense of the petitioner's business.

[19] INT. REV. CODE of 1954, § 212: "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year —

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income."

In disallowing the deduction in the instant case, the court examined the legislative history of section 165(a) and concluded that Congress assumed that losses by corporations would arise out of its trade of business. The court reasoned that since such an assumption cannot be made with respect to losses suffered by an individual, the limitations set forth in section 165(c) are necessary and their absence from section 165(a) is appropriate. Using an integrated approach to the Code, the court refused to adhere to a literal reading of the statute and cited *United States v. Kirby*[24] to support the proposition that the reason of the law should prevail over its letter. The court noted that the Supreme Court had applied this rule of statutory construction to a revenue act in *Helvering v. Owens.*[25] There the taxpayer's casualty loss on his personal automobile was limited to the difference between its cost reduced by depreciation, which in fact had not been allowed by reason of the personal use of the automobile, and the value after the accident. The Court recognized this limitation despite the fact that a literal reading of the statute seemed to allow a loss in the amount of the difference between the cost and value after the casualty. Although section 274 was not specifically applicable to the years in question, its legislative history provided insight to the court in determining whether section 165 (a) allowed a deduction of a loss suffered on the sale of nonbusiness assets. The court noted that Congress was quite explicit in detailing that losses incurred on the sale of entertainment-type facilities would not be deductible.[26] Particular emphasis was placed on the fact that the taxpayer had previously been denied a depreciation deduction on the property in question because it was neither business nor income-producing property.[27] Thus the court concluded that the allowance of a loss deduction on the sale would in effect give the taxpayer the benefit of a substantial portion of the depreciation which had previously been disallowed as a deduction.

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[20] *See* CHOMMIE, *supra* note 13, at 109.

[21] INT. REV. CODE of 1954, § 274.

[22] Expenses related to entertainment activities and facilities must meet two tests in order to be deductible. First, there is the "ordinary and necessary" test of sections 162 and 212. Secondly, the expenses must meet the "directly related to business" test of section 274.

[23] *See* Treas. Reg. § 1.274-2 (e) (3) (i) (1963).

[24] 74 U.S. (7 Wall.) 482 (1868). "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *Id.* at 486.

[25] 305 U.S. 468 (1939).

[26] *See* S. REP. No. 1881, 87th Cong., 2d Sess. 31 (1962). The substance of this report has been embodied in the Treasury Regulations interpreting § 274. *See* Treas. Reg. § 1.274-2 (e) (3) (i) (1963).

Six judges dissented on the ground that the language of section 165(a) is clear and places no limitations on the deduction of losses by corporations. Judge Tannenwald, in his dissenting opinion, believed that an adoption of the "held for use in trade or business" test would produce a myriad of problems in that the test does not mean that the property actually must be so used.[28] Furthermore, he noted that the corporation would be in a worse position than the individual shareholders had they owned the property directly.[29] The dissenting opinion of Judge Drennen took issue with the majority opinion on the ground that its conclusion represented an exercise of authority far beyond that of any court. He reasoned that it could hardly be argued that Congress, in rearranging the loss provisions in 1954, was not aware of the effect of placing limitations on individual losses only.

The divergence of the two views expressed by the court concerning its responsibility in construing a statute is one of emphasis. Proponents of the majority's view argue that the courts have a responsibility to carry out the purpose of the legislation even if it means going beyond the literal meaning of the words of the statute. To do otherwise is to burden Congress with the necessity of considering additional details of the law. The cases are numerous in which the courts have refused to adopt a literal approach in construing a statute to avoid a defeat of Congressional purpose.[30] Opponents of this view support strict adherence to the ordinary meaning of the statute and argue that the courts do not have the authority to go beyond the literal meaning of the statute when the language is clear. The court in the instant case interpreted *Helvering v. Owens* as a master key to the doors of judicial legislation. If the dicta of *Owens* were logically applied to the instant case, one would be compelled to allow the taxpayer a deduction for the loss, but limited to the difference between the proceeds of the sale and the original cost less depreciation.[31] It is apparent that the courts must be vested with authority to give effect to the intentions of Congress when construing a statute. Nevertheless, the exercise of that authority should not open the door to Pandora's box and create a multiplicity of additional problems. The test promulgated by the majority court results in the creation of a nebulous standard by which an explicit statute will be interpreted.[32] It cannot reasonably be argued that Congress intended the result of the instant case when it placed limitations in section 165(c) only. A legislature acts by legislating, not by remaining silent. The decision of the court in the instant case disregards the fundamental principle that legislation is not the function of the judiciary but of Congress. If limitations are to be placed upon corporate losses, it is for Congress to specify them.

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[27] INT. REV. CODE of 1954, § 167.

[28] *Compare* Alamo Broadcasting Co., 15 T.C. 534 (1950), *with* Nulex, Inc., 30 T.C. 769 (1958), [*and*] Rev. Rul. 56-520, 1956-2 CUM. BULL. 170.

[29] If the Beaver Lake property had been destroyed by fire or other casualty, the absolute rule dictated by the majority opinion would deny any loss to a corporation. On the other hand, such loss would clearly be deductible by an individual under section 165 (c). Judge Tannenwald further stated that Helvering v. Owens, 305 U.S. 468 (1939), did not demand that the court rewrite section 165 (a). He interpreted *Owens* as standing for the proposition that the measure of a loss is to be geared to economic realities and noted that the case might be applied in the instant case to limit the loss to the difference between the proceeds of the sale and the original cost less nondeductible depreciation.

[30] *See, e.g.,* Corn Products Co. v. Commissioner, 350 U.S. 46 (1955), wherein the Court held that income realized from transactions of commodity futures would be treated as ordinary income rather than capital gains.

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[31] In Nulex, Inc., 30 T.C. 769 (1958), the court reached a similar result. A taxpayer was allowed to deduct the difference between the selling price of a nonbusiness asset and the cost less depreciation, which had been disallowed due to the nonbusiness nature of the property.

[32] The application of the "held for use in trade or business" test in prior cases has yielded varying results. *See* Nulex, Inc., 30 T.C. 769 (1958). In 1946 when the taxpayer was dormant in the oil and gas business, it purchased a boat for the purpose of entering into the commercial chartering business. When taxpayer could not secure a license for the boat, it sold it at a loss. The court held that the boat was not property used in a trade or business and disallowed a depreciation deduction.

In Alamo Broadcasting Co., 15 T.C. 534 (1950), the taxpayer radio station purchased high-powered transmitting equipment from a Mexican radio station. When taxpayer failed to secure permission to remove the equipment from Mexico, it sold the equipment at a loss. In holding that the property was used in trade or business, the court stated: "We have previously held that 'used in the trade or business' means 'devoted to the trade or business' and includes property purchased with a view to its future use in the business even though this purpose is later thwarted by circumstances beyond the taxpayer's control." *Id.* at 541.

See Carter-Colton Cigar Co., 9 T.C. 219 (1947), where the taxpayer, a wholesale distributor of tobacco products, purchased unimproved real estate with the intention of erecting a business building thereon to be occupied by it. The original purpose was later abandoned, and the property was sold at the first opportunity. The court held that the property was used in trade or business and stated: "The acquisition of real estate for use at its principal place of business by a corporation is a proper business purpose and function, and the real estate so purchased, in our opinion, is devoted to and 'used in' the business of the corporation during the planning and building stages preparatory to actual occupancy." *Id.* at 221. *But cf.* Rev. Rul. 56-520, 1956-2 CUM-BULL. 170, where the taxpayer, a radio broadcasting corporation, made expenditures during the course of a contest before the FCC to determine whether it should be awarded permission to use a certain channel in connection with its proposal to operate a television station. The ruling held that (1) the amounts expended were not deductible from gross income; (2) since the useful life of the asset was of an undeterminable duration, no deduction was allowed for depreciation; and (3) the cost basis is recoverable upon its sale or other disposition.

See also Kittredge v. Commissioner, 88 F.2d 632 (2d Cir. 1937); Yellow Cab Co. v. Driscoll, 24 F. Supp. 993 (W.D. Pa. 1938); Wilson Line, Inc., 8 T.C. 394 (1947); P. Dougherty Co., 5 T.C. 791 (1945).

Private Clubs — State Regulation and State Action

Appellee, a Negro, brought this action seeking an injunction revoking the liquor license issued Moose Lodge No. 107, a private club,[1] by the Pennsylvania Liquor Control Board.[2] In keeping with its policies of racial discrimination, Moose Lodge No. 107 refused service of food and beverage to the appellee.[3] Appellee claimed this discrimination was violative of 42 U.S.C. § 1983,[4] and requested injunctive relief. A three-judge district court was convened,[5] and granted the appellee's requested relief.[6] On direct appeal[7] to the United States Supreme Court, *held*, reversed and remanded. Where a state regulatory scheme is neutral in its effect on acts of discrimination by a private club, racial discrimination by that club is private and does not involve the state sufficiently to constitute "state action" subject to the equal protection clause of the fourteenth amendment. *Moose Lodge No. 107 v. Irvis,* 92 S. Ct. 1965 (1972).

Discrimination results from either private action or state action. The Supreme Court has held that the fourteenth amendment proscriptions against racial discrimination apply only to discrimination committed by the state and not to discrimination committed by private citizens.[8] The Court in the *Civil Rights Cases,*[9] said Congressional power to prohibit racial discrimination[10] could only be used to enforce prohibitions against "state action of a particular character."[11] The issue of "state action" has traditionally been presented in actions brought under post-Civil War legislation or under their more modern counterparts.[12] In the ensuing line of cases involving the "state action" question, the Court has found "state action" to be present in many diverse methods of discrimination.[13] In a concurring opinion in one of these cases,[14] Justice Douglas, in considering the scope of *Shelley v. Kraemer,*[15] said that "leaving the zoning function to groups which practice discrimination and are licensed by the states constitutes state action in the narrowest sense in which *Shelley v. Kraemer* can be construed.[16] Justice Douglas further indicated that any business that is regulated and licensed by the state should be nondiscriminating.[17] The urgency of the "state action" issue has been diminished by the proscriptions of the Civil Rights Act of 1964 which are applicable to discrimination in places of public accommodation as well as to discrimination under color of state law.[18] Moreover, because of the facts and circumstances of allegedly private discrimination, it is easier to find "public accommodation" rather than "state action." Since private clubs are excepted from the provisions of Title II of the Civil Rights Act,[19] discrimination by these clubs is not unlawful unless "state action" is involved.

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[1] The Court offered several reasons for the classification of Moose Lodge No. 107 as a private club. These include the following: (1) it is a local chapter of a national fraternal organization with well-defined requirements for membership; (2) it owns its own building; (3) it is not publicly funded; (4) only members and guests are permitted in the lodge; and (5) guests must be invited by a member or by the house committee. The Court noted also that the Lodge is located on land owned by it; it is not open to the public; and it is not located in such a position that it performs a function that would otherwise be performed by the state. Moose Lodge No. 107 v. Irvis, 92 S. Ct. 1965 at 1970, 1972 (1972).

[2] The license had been issued in compliance with state laws and regulations, which require that "every club licensee shall adhere to all the provisions of its constitution and by-laws." 92 S. Ct. at 1973, *citing* Reg. of Pa. Liquor Control Bd. § 113.09 (June, 1970 ed.).

[3] Section 92.1 of the General Laws of the Loyal Order of the Moose states that only persons qualified for membership may be guests. 92 S. Ct. at 1974. To be qualified for membership, a person must be a Caucasian. *Id.* at 1968.

[4] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] 28 U.S.C. § 2881 (1970) requires the convening of a three-judge district court in order to restrain enforcement of a state law or administrative regulation.

[6] Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970).

[7] 28 U.S.C. § 1254 (1970) provides for direct appeal to the Supreme Court from a three-judge district court.

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[8] *See, e.g.,* Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875). *But see* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) (a thirteenth amendment case).

[9] 109 U.S. at 11.

[10] The Court was speaking of the Civil Rights Act of 1875, 18 Stat. 335 (1875).

[11] 109 U. S. at 11.

[12] 42 U.S.C. § 1983 (1970) was derived from section 1 of the Civil Rights Act of 1971, Rev. Stat. § 1979 (1875).

[13] Since the scope of this note is limited to "state action" in discrimination by private clubs, a discussion of the cases otherwise developing the "state action" concept would be overbroad. For a discussion of these cases, *see* G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW, ch. 6, § 2 (8th ed. 1970); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 YALE L. J. 1353 (1964); Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Comment, *Civil Rights—State Action Not Required Under Sections 1981, 1982, and 1985 (3) of Title 42; Action "Under Color of State Constitutional Right" Satisfies the "Color of Law" Requirement of Section 1983, 23* VAND. L. REV. 413 (1970).

[14] 387 U.S. 369 (1967) (discrimination in housing).

[15] 334 U.S. 9 (1948) (enforcement of restrictive covenant was "state action").

[16] 387 U.S. at 384-85.

[17] *Id.* at 386.

[18] *See* 42 U.S.C. § 2000a (a) (1970). In cases where discrimination was in a place of public accommodation, there need be no "state action"; suit can be brought under this act rather than 42 U.S.C. § 1983 (1970).

[19] 42 U.S.C. § 2000a (e) (1970).

In the instant case, the Court approved of the difference in the effect of private and state discrimination established by its decision in the *Civil Rights Cases,*[20] and further noted that *Shelly v. Kraemer*[21] made unlawful a state's enforcement of discrimination originating from private sources. The Court then reiterated its holding in *Reitman v. Mulkey*[22] that where the impetus for discrimination is private, the state's involvement in that discrimination must be significant for it to be unconstitutional. The Court found that with the exception of the state's requirement of the lodge's compliance with its by-laws,[23] the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board had nothing to do with the establishment or enforcement of the appellant's discriminatory guest policies. The Court then concluded that the board's licensing of the club did not amount to "state action", and therefore, the club's discrimination was private and not violative of the fourteenth amendment.[24]

The Court's decision in *Moose Lodge* is significant in several respects. The decision establishes that discrimination by a private club is not forbidden by the fourteenth amendment merely because the club is associated with a state regulatory agency. Although far-reaching implications were initially envisioned when *Moose Lodge* was decided, the practical effect of the case will be limited since an ostensibly private club practicing racial discrimination will find it difficult to be classified as "private" under the 1964 Civil Rights Act and thus escape the proscriptions of that Act[25] or similar state statutes.[26] The more significant aspect of the Court's decision is its refusal to find "state action" when faced, apparently for the first time, with the task of measuring state action against the neutral involvement of a state in a private club's acts of racial discrimination. Had the Court determined that discrimination under these circumstances was unlawful, the lines between state and private discrimination would have been obliterated. Since nearly everyone is, in some way, affected or regulated by the state, virtually all acts of discrimination could be considered unlawful. For example, a person engaged in acts of discrimination would surely be doing so as a home owner, property owner, automobile operator, or in some other capacity which is neutrally regulated by the state. Thus *Moose Lodge* should not be regarded as a withdrawal by the court from established concepts of state action but as an appropriate refusal to extend the state action doctrine beyond its logical, practical limits and into the realm of true private action.

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[20] 109 U.S. 3 (1883) (private discrimination is not forbidden by fourteenth amendment).

[21] 334 U.S. 1 (1948).

[22] 387 U.S. 369 (1967).

[23] The Court did enjoin the enforcement of section 113.09. If enforced, however, that section would have required the Moose Lodge to adhere to its racially discriminatory by-laws. *See* note 3 *supra.*

[24] Dissenting opinions were filed by Justices Douglas and Brennan with Justice Marshall joining in each. Justice Douglas maintained that a relative scarcity of liquor licenses for blacks, as a result of the state enforced regulatory scheme, created "state action." Justice Brennan claimed that the state regulation of liquor made it so related to the lodge that "state action" resulted. 92 S. Ct. at 1976, 1978.

[25] *See, e.g.,* Daniel v. Paul, 395 U.S. 298 (1969), in which an allegedly private recreation facility was deemed to be a "public accommodation" within the meaning of the 1964 Act, because it offered to serve interstate travelers, a substantial portion of the food served there had moved in interstate commerce, and the Club was a place of entertainment whose operations affected commerce.

[26] After the decision in the instant case, the Pennsylvania Supreme Court found that Moose Lodge No. 107 was a place of "public accommodation" within the meaning of the state's Human Relations Act. Pennsylvania Human Relations Comm'n v. Moose Lodge No. 107, 41 U.S.L.W. 2079 (Pa. July 31, 1972).

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BOOK REVIEW

MARIHUANA: A SIGNAL OF MISUNDERSTANDING

First Report of the National Commission on Marihuana and Drug Abuse. Washington, D.C., U.S. Government Printing Office, 1972. Pp. x + 184. $1.00 (paper cover).

During the past decade the use of marihuana by the youth of this nation has created a major national problem. As a result, President Nixon in conjunction with Congress appointed a special commission to study marihuana in all of its contexts and report upon the findings. What resulted was a thorough, yet non-technical study focused on the American experience. In achieving this end, it is quite evident from reading the report that the Commission utilized an independent, nonpartisan approach in evaluating the polemics surrounding marihuana. The mere fact that such a study was sanctioned reflects a sincere desire on the part of the federal government to learn the truth about marihuana rather than basing their views on mere conjecture.

The Commission, in order to structure its report in the most logical and cogent manner, divided the text into five major sections: I. Marihuana and the Problem of Marihuana; II. Marihuana Use and Its Effects; III. Social Impact of Marihuana Use; IV. Social Response to Marihuana Use; and V. Marihuana and Social Policy. This review will discuss and evaluate each of these major topics.

I. Marihuana and the Problem of Marihuana

Since the mid-sixties the so-called marihuana problem has continuously acted to agitate and polarize large segments of American society and is now viewed by many as a major national problem. This conclusion, the Commission believes, stems from three interrelated factors. First, the illegal use of marihuana is visible to the general populace. This exposure may be credited to the mass media. As a direct result, society has been confronted with visible evidence, valid or otherwise, of widespread use of the drug by a segment of our population which never before had used marihuana. Consequently, the resulting anxiety, coupled with misinformation and ignorance concerning marihuana, has helped foster the "problem." Secondly, society has come to view marihuana as a threat to the health and morals of not only its users but also society itself. Idleness, lack of motivation, and sexual promiscuity are just a few of the immoral and antisocial behaviors linked with the use of the drug. In fact, many believe that marihuana is the impetus of a counterculture aimed at the rejection, if not the destruction, of society's cherished values. Thirdly, and most importantly, the use of marihuana has come to symbolize wider conflicts and public issues. This is particularly true of the current youth movement and its disaffection with traditional society.

In an effort to reach a better understanding of the marihuana problem, the Commission sought to place the drug's use in the proper historical and cultural perspectives. Historically, marihuana has been used throughout the world for centuries, but only within the last seventy-five years has its use emerged in the United States. Paralleling the introduction of marihuana into the United States was the surfacing of the previously overlooked problem of narcotic addiction. At that time narcotic addiction was almost nonexistent. Nevertheless, because little was known about marihuana, it was considered to be a narcotic. Society responded to this so-called "narcotic problem" by the enactment of stringent criminal legislation. During this same period emerged a concomitant clamor for the prohibition of alcohol and tobacco. Consequently, certain comparisons must be drawn. Consumption of alcohol and use of tobacco, unlike the use of marihuana, are indigenous American practices. Furthermore, while the temperance movement was marked by vigorous public debate resulting in legislation aimed toward eradicating definite problems stemming from alcohol abuse, the antinarcotic legislation resulted from a strong undercurrent whose expected end was largely anticipatory. The evolution of these movements has resulted in alcohol and tobacco use becoming one of personal choice while the use of marihuana is still criminally prohibited. The disparity here, as pointed out by the Commission, is further emphasized by the fact that over nine million persons suffer from alcoholism, and one-half of all highway deaths, homicides, and arrests in general are related to alcohol misuse. Similarly tobacco smoking has been directly linked to lung cancer and heart disease.

The Commission points out that a possible cultural reason behind the increase in marihuana use has been the rapid technological changes that have occurred in our society. The rationale of this statement is based on the educated assumption that automation has acted to strip man of a part of his identity and at the same time provided him with more leisure time to search for individual fulfillment. At the same time the mobility of modern society has acted to destroy an individual's sense of community. All of these social trends have had their strongest influence on young people. Young people having grown up during this period of rapid change have known no other experience except excessive leisure stemming from affluence. The use of marihuana, like alcohol and tobacco use, is merely a method of leisure enjoyment. The Commission concludes in part that although society has the right to interfere with individual conduct if such conduct is detrimental to society, this interference should not be wantonly used but rather should be relegated to the careful scrutiny of the complicated question of the social impact of private behavior.

II. Marihuana Use and Its Effects

The Commission found that the use of marihuana has permeated all segments of the American population. Use was found to be prevalent in every strata of society, though more predominant among persons with above average intelligence and incomes. The incidence of use was found to be greatest among young people. Furthermore, usage was highest in areas of dense population, while little usage was noted in rural areas.

The Commission categorized the marihuana user based on frequency of use. It was emphasized, however, that the traits delineated per category were not necessarily exclusive to marihuana users. The first and largest category was designated by the Commission as "experimental users." These users are practically indistinguishable from the non-user. This group uses marihuana once a month or less. The second group, termed "intermittent users," uses the drug irregularly, normally at least once a month but less than several times a week, for its social and recreational purposes. These users tend to use the drug as a sort of social group ritual. Like non-users, they are likely to be intellectually and culturally oriented, self-expressive, creative, and flexible. The final groups of users are the "moderate and heavy users." The "moderate users" tend to share traits with both the "intermittent and heavy users." The "heavy users" use the drug for its personal rather than its social effects.

In almost all instances the Commission found that the "intermittent and moderate users" are virtually indistinguishable from the non-users except for the marihuana use. A person's biological characteristics and personality in conjunction with his cultural and social setting are recognized as playing an important part in determining if an individual will use marihuana. The Commission found a direct relationship between an individual's use of marihuana and the life style of his parents. In fact, the marihuana user frequently has parents who use alcohol and tobacco. Furthermore, marihuana users have been found, in most instances, to be users of alcohol and tobacco as well.

Another major factor in the usage of marihuana is the social influence exerted by one's peer group. Having friends who use marihuana provides the curious with the opportunity to experiment. Social peer groups are most influential upon young people. A group-accented activity provides the shy, lonely, and insecure individual with a key to group acceptance. Because of boredom with the effect, legal hazards, fear of health hazards or social pressures, "experimental and intermittent users" often discontinue use.

As to the claim that marihuana use leads to the use of harder drugs, the Commission found that only a small percentage of marihuana users who experiment with other drugs become persistent, frequent users. Rather, the use of other drugs depends on the individual, his social and cultural setting for such drug taking, and on the nature of the drug market. However, there is no proof that such drug taking is inevitable or necessary.

The actual effect of marihuana depends upon several variable factors. These include such things as dosage, method of use, the metabolism of the user, the setting, and tolerance. The effect itself on the user's state of mind includes the alteration of emotions, feelings, sensibility, consciousness, and thinking.

The Commission identified immediate effects as those occurring during drug intoxication or shortly thereafter. The effect during intoxication is, in most cases, analogous to daydreaming. In addition, the user experiences a feeling of well being, restlessness, hilarity, hunger, partial loss of memory, and alteration of sensory perceptions. Nevertheless, such changes are not perceivable to an unknowing observer. As the dosage increases, the more intensified are the reactions. Based on medical evidence the Commission concluded that there was little proven danger of physical or psychological harm from experimental or intermittent use of marihuana. Nor was any psychological dependence on the drug observed by such users. However, slight psychological dependency was observed in "moderate users," yet such dependency was proven to be no greater than that experienced by alcohol users. In many instances the degree of dependency was shown to be less.

III. Social Impact of Marihuana Use

The greatest amount of fear and corresponding rhetoric concerning marihuana has centered on the popular belief that marihuana use is harmful to society in general. This harm refers to the blind belief that marihuana use is linked to crime, anti-social behavior, and parasitic social dependency. These unsubstantiated beliefs have resulted in the creation of the stereotyped marihuana user — *i.e.,* an irresponsible, mentally ill, criminally inclined individual with aggressive tendencies. In most instances marihuana has been linked to such behavioral traits merely because such an individual was found to be in possession of marihuana. However, no proof has established a positive and direct relationship between marihuana use and anti-social conduct, be it criminal or delinquent. Rather, as the Commission points out, many variables must be taken into consideration to establish such a relationship. In fact, based on current professional opinion and empirical data, no relationship has been found to exist between the use of marihuana and the commission of violent or non-violent crimes. Rather marihuana has been found in most cases to pacify a person's aggressive, anti-social tendencies. Those users who commit crimes do so, not because of marihuana use, but because of definite social, economical, and environmental factors. Indeed, the bulk of evidence shows that a large majority of crimes are committed by persons under the influence of alcohol. Consequently, within this framework, neither the user nor the drug can be said to constitute a danger to public safety. In an attempt to dispel many of society's unfounded fears about marihuana, the Commission explains that marihuana use is not lethal, does not cause genetic damage, and causes no physical damage or abnormalities such as tobacco and alcohol use does. Less than chronic, heavy use causes minimal motivation losses and no greater psychological dependence than tobacco smoking. Based on these facts, the Commission concludes that marihuana use at the present level in no way constitutes a threat to public health.

Marihuana is identified today primarily with young people because they constitute the greatest percentage of users and because of the openness in which they use the drug. Society identifies bohemian appearance, counter-culture activity, and rejection or "dropping out" of contemporary society with drug usage. However, it is highly unlikely that the introduction of a single element, such as marihuana, could change the basic personality and character structure of an individual to any degree. Rather, the Commission suggests, the tendency to drop out is generated from multiple factors causing pressures on the individual with which he is incapable of coping. Nor does marihuana use go hand in hand with radical politics. The exponents of radical politics have cunningly espoused and manipulated marihuana use in an attempt to achieve their political ends. Consequently, the emergence of radical politics has been cleverly used to cloud and blight the marihuana issue. Marihuana usage, viewed in the context of the profound changes that have occurred in recent years in the areas of economics, civil rights, politics, family life, religion, recreation, and employment, is considered by the Commission as being more of a consequence rather than an impetus of these changes. It is unlikely that marihuana will affect the future stability, strength, or vitality of our social and political institutions.

IV. Social Response to Marihuana Use

Since the use of marihuana first surfaced in this country, society has been divided as to the most appropriate method of controlling its use. As the survey conducted by the Commission reveals, approximately one-quarter of the American public is in favor of removing criminal sanctions, another one-quarter is convinced that the current social and legal policies should be maintained and the remaining one-half of the citizenry is confused or ambivalent as to what should be done. The Commission sought in its study to determine alternate social and legal policies that would best meet the needs of society as a whole. As noted previously, the initial social response to marihuana use was tailored to the narcotic policy adopted by the federal government—*i.e.,* that marihuana was a dangerous habit forming narcotic that should be stringently regulated by strict criminal laws. As a result, all states in one manner or another adopted criminal laws making marihuana use and possession a crime. However, with the rapid increase of use during the mid-sixties by middle and upper class college youth, a reevaluation of existing social and legal policies was needed. The impetus behind this mood stemmed from the fact that persons with no previous criminal records from solid family and educational backgrounds were being arrested and incarcerated for the mere possession or use of marihuana. Also, marihuana was of a totally different nature than the narcotics with which it was classified. With the increase in arrests and convictions, a paralleling decline in the number of incarcerations and the average length of sentences was noted. In further response, the federal government and approximately 75 percent of the states have reduced possession of marihuana to a misdemeanor, with first offenders usually given some form of probation. On the federal level, little or no effort is made to seek out possessors of marihuana, and the cases of those arrested for possession or casual transfer are normally dismissed or turned over to the appropriate state for prosecution. On the state level, a similar policy of not seeking out private marihuana use is followed and arrest resulting from violation of marihuana possession laws occur only when the possession is found to be open and notorious. When these arrests occur, the Commission noted that the offenders were generally arrested in groups. In fact the Commission found that 31 percent of the prosecutors surveyed stated they would not prosecute anyone arrested using marihuana at a private social gathering. Furthermore, many officials of the criminal justice system were shown to be disenchanted with the present criminal controls and thus less insistent on any method of formal control. Many non-legal institutions such as the family, schools, and the medical community also expressed a desire for more lenient controls. Uncertainty as to what should be the proper controls is the common denominator of all concerned. Regardless of this uncertainty the startling fact is that young people, who are not criminals in any form or fashion, are being incarcerated and permanently branded with police records. The public, the Commission found, is aware and extremely upset by this fact. Resultingly, they have expressed the opinion that the present laws should be revamped to be made more lenient.

V. Marihuana and Social Policy

A recognized conflict exists in our society between individual liberty and social restraint. This conflict is nowhere more evident than in the marihuana controversy. Consequently the Commission sought to evaluate the various approaches used to control marihuana. One such approach is the approval of marihuana use, but the Commission believed that such an attitude would only encourage some people to use the drug who otherwise would not be so inclined. This would most likely increase the heavy or irresponsible uses. On the other hand, an approach towards elimination of use is likewise not feasible, if for no other reason than it would require a great increase in manpower and resources to achieve the end desired. In deference to the above mentioned approaches, the Commission concluded that an attitude of discouragement should be adopted with concentration on the prevention of heavy and very heavy usage. A part of the Commission's reasoning is that marihuana use is a fad and if not institutionalized will recede substantially in time. However, implementation of such a policy would be very difficult to enforce. This is exemplified in similar policies restricting tobacco and alcohol use by the young, yet their enforcement has been far from effective.

Possession and use of marihuana generally refers to a form of behavior indicatively personal that takes place in private. The only social consequences identified from such behavior occur when such usage becomes heavy to very heavy. Based on this knowledge the Commission concluded that the present criminal laws for personal possession are too harsh to achieve a policy of discouragement. The harm, whether real or fantasy, that results from marihuana use is not great enough to warrant intrusions by criminal law into private behavior. In order to overturn existing criminal laws, the Commission presented several possible constitutional issues. The gist of these issues is that the government lacks the power to invade the privacy of an individual and regulate his conduct unless such conduct presents a direct injury to society.

The effectiveness of our present prohibitory laws concerning the possession and use of marihuana is nebulous. The belief that possession penalties are instrumental in coercing users to reveal their sources has been proven to have little validity. The normal user is too low in the chain of distribution to have any effect on the diminishment of drug sources. Another grave consequence of the present drug laws is that the vast increases in prosecutions has clogged judicial calendars. Based on such reasoning, the Commission believes that current possession penalties do little to further the discouragement policy. Rather, possession penalties result in heavy social costs, not the least of which is the disrespect and cynicism exhibited by some of the young. On the other hand, the Commission also rejected the regulatory or legalization scheme because of the uncertainty surrounding possible long term effects. Instead, the Commission recommended a policy of partial prohibition which would continue to make the production and distribution of the drug a criminal offense while removing existing criminal sanctions for private possession and use. The Commission further recommended confiscation and fines for public use of the drug but discontinuance of any criminal action. These recommendations reflect the changes that the Commission felt should be made to present federal law. In addition, the Commission proposed that the casual distribution of small amounts of marihuana for little or no remuneration be decriminalized. Nevertheless, marihuana intoxication would not be a defense to any criminal act or intent. The Commission also made specific recommendations for state law which would continue to make the production and sale for profit of the drug a criminal offense while alleviating such penalties for private possession and use and making public use a low grade crime punishable by a fine.

The Commission deserves praise for the rigorous analysis and evaluation of prevailing theories that marihuana use is harmful. The Commission's report represents a fresh and unbiased attempt towards evaluating legislation in a new and promising way. The cogent and comprehensive manner displayed by the Commission in its attempt to demythologize current beliefs concerning marihuana reflects a sincere desire to place marihuana use in its proper perspective in relationship to American society. The Commission's recommendation to discontinue the present prohibitory controls in favor of a discouragement policy with concentration on prevention and treatment of heavy and very heavy use represents a rational and practical approach to the problem. The current criminalization of marihuana possession for personal use is socially self-defeating as a method of achieving the desired means. This study has succeeded in demythologizing, desymbolizing, and deemphasizing, the false beliefs concerning marihuana. Based on evidence presented, it is quite obvious that marihuana does not constitute a valid social problem in contemporary America. In fact, existing social and legal policy is out of proportion to the potential individual and social harm that the use of the drug might generate. Based on the existing situation and evidence presented, the Commission's recommendations for changes in current federal and state law reflect the only rational and feasible answer. The adopiton of such changes in the law could well act as a catalyst for bringing certain fragmented segments of American society back together again.

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James Dennis Dobbs
P. O. Box 327
Jason Niles McNeel
Louisville Street

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Billy James Funderburk
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Box 267
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Chancellor 1st District

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John B. Farese
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210 Broadway
William J. Clayton
210 Broadway
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Ben Barrett Smith
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Ted Lucas Smith
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Nicholas M. Haas
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Cornelius Joseph Ladner
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20 B. Edgewater
Garden Apt.
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Box 153
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110 West Howard Ave.
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Victor B. Pringle
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Box 238
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Roland Benjamin Skinner
177 Reynoir Road
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College Street
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Yancy & Gibson
Billy R. Gibson
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324 Shady Lane
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232 West Peace Street
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Co. Court Madison Co.
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J. E. Smith
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A. M. Warwick
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A. R. Wright, Jr.
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George P. Cossar
Cossar Building
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  313 Issaquena Avenue
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  449 Andrews
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  212 North 4th
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Stephen W. Blackburn
  207 North Street
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  112 North Pearman Ave.
William Roy Ford
  522 Robinson Drive
Lonnie E. Griffith
  P. O. Box 159
John L. Hatcher
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Joseph M. Howorth
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Lucy S. Howorth
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A. B. Sparkman
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Carmon E. Valentine
  205 South Court St.
John White Valentine
  205 South Court St.
James H. Walker
  Box 966
Arthur C. Whittemore
  609 John Drive
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Edwin K. Clayton
  1004 Briarwood Drive
Herbert D. Farrell
  1002 Laurewood Drive
David Fred Fleming
  106 Landrun Apt. 3
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  1104 East Northside Dr.
N. Shelton Hand, Jr.
  Mississippi College
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Ewell McDonald, Jr.
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C. G. Muse, Jr.
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Percy Howard Parkman
  Box 224
William R. Phillips
  101 Sunset Drive
John H. Rogers
  1007 Tanglewood Drive
George B. Taylor
  716 Bellvue Street
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  1612 Tanglewood Drive
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Chester Davis Gaston
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Osborn G. Idom
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Charles Summer
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Rodger Downing Wasson
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J. Wesley Watkins, III
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Taylor Webb
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Burwell B. Wilkes
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Box 364
James Yeager Dale
Drawer 1180
Charles Milton Deaton
Drawer B
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John J. Fraiser, Jr.
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109½ Johnson Street
Hardy Lott
P. O. Box 1176
R. Cunliffe McBee
Drawer 657
George Hite McLean
P. O. Box 516
Pearl McLellan
Box 54
Floyd M. Melton, Jr.
417½ Bell Avenue
W. H. Montjoy
Box 906
Yerger Morehead
Whittington Bldg.
Thomas Morris
Box 1909
Whitman D. Mounger
122 Riverside
Frank K. Odom
P. O. Box 674
H. Talbot Odom
Drawer 1218
Porter W. Peteet
Box 263
James M. Pierce
P. O. Box 915
Judge Charles Pullard
P. O. Box 393
William H. Roberson
P. O. Box 263
Luke J. Schissel
Drawer 1218
Gordon L. Smith
804 Bell Avenue
Richard L. Smith
Drawer 1139
Waldo Sterling Stuckey, Jr.
401 Mac Arthur
Anthony Lavon Thaxton
Box 146
James E. Upshaw
Drawer 1180
Seth Wheatley, Jr.
Box 389
Charles Leroy Whitam
Drawer D
W. M. Whittington, Jr.
P. O. Box 941
Fred Witty
P. O. Box 921

GRENADA

Edwin Tharp Cofer
Jim McRae Criss
P. O. Drawer C
Floyd M. Davis, Jr.
1584 Vance Road
William H. Fedric
North Side of Pub. Square
Jay Gore, Jr.
Box 901
John T. Keeton
P. O. Box 666
Lucille T. Latta
P. O. Box 922
Mitchell M. Lundy
11 Evans Building
Judge Marshall Perry
P. O. Box 444
Leon E. Provine
P. O. Box 99
William O. Semmes
P. O. Box 567
Samuel J. Waits
Box 204

GULFPORT

Bidwell Adam
P. O. Drawer BB
Harry Roger Allen
P. O. Box 996
Judge Frank W. Alexander
P. O. Box 986
Wade Baine
P. O. Box 1834
Robert Barber, Jr.
P. O. Drawer DD
Peter Hickman Barrett
806 Second Street
Thomas Henry Barrett, Jr.
630 Second
John H. Barnett, Jr.
915 Wanda Place
Thomas Davis Berry, Jr.
1319 24th Avenue
Charles G. Blackwell
203 Gulf South Bldg.
Leonard A. Blackwell, II
1611 - 23rd Avenue
W. Joel Blass
Box 160
Eldon Bolton, Jr.
P. O. Box 100
Luther R. Boyd
Hancock Bank
Trust Department
Norman Breland
Box 396
Rae Bryant
P. O. Box 10
Thomas Ware Burt
206-207 Security Sav. Bldg.
Anthony J. Caranna
1225 31st Avenue
Pete H. Carruba
P. O. Drawer W

Napoleon Lepoint
Cassibry, II
Box 1686
Roger T. Clark
P. O. Box 179
David Leroy Cobb
Box 996
Everett E. Cook
Drawer C
Bruce G. Cornell
3rd Floor Hewes Bldg.
David Cottrell, Jr.
P. O. Drawer H
Jimmy G. Dedeaux
406 Hewes Building
Harold Joseph Demetz
P. O. Box 1686
William F. Dukes
Drawer W
Phil R. Dunnaway
P. O. Drawer C
James S. Eaton
P. O. Drawer H
G. E. Estes, Jr.
Box 88
William Estopinal
Medical Building
Milton Ray Fairchild
1919 15th Street
Captain Mark T. Finch
USAF
1101 Beach Avenue C-12
Margaret E. Fisher
609 Woodward Avenue
Jason H. Floyd
P. O. Box 1107
Jason H. Floyd, Jr.
Box 1107
E. J. Ford, Jr.
201 Hatten Bldg.
Paul M. Franke, Jr.
Drawer 100
Edward Gaines
2209 14th Street
Charles R. Galloway
P. O. Drawer H
James Babington Galloway
Drawer H
Robert Charles Galloway
Drawer H
John M. Gardner
1425 24th Avenue
Virgil G. Gillespie
Box 507
D. M. Graham, Jr.
P. O. Box 22
Richard B. Graves, II
Suite 100, 2120 Building
2120 14th Street
P. D. Greaves
Suite 308 Gulf
National Bank Bldg.
Ben A. Hardy
Box 1107
Roger Dean Harris
Room 308 Gulf
South Building
T. J. Buchanan Heiss
1503 24th Avenue
John F. Hester
Bayou View Apts. Apt 7-H
Jody Nelson Drive
Harry P. Hewes
304 Hewes Building
Box 992
Gaston H. Hewes
Hewes Building
Judge William G. Hewes
P. O. Box 454
Viola J. Hilbert
Box 4043
Forrest E. Holder
22 Poplar Circle
Boyce Holleman
P. O. Drawer 1030
Alben N. Hopkins
P. O. Drawer W
Raymond Hunter
Box 88
Robert E. Husband
Suite 302 Gulf So. Bldg.
John C. Johnson
303 Gulf South Bldg.
Walter R. Johnson
211 Gulf S. Bldg.
Walter Rayford L. Jones
P. O. Box 1504
Oscar B. Ladner
Box 727
Eaton A. Lang, Jr.
P. O. Drawer H
Larry Lee Lenior
Box 507
Aristide F. Lefeve, Jr.
1911 24th Avenue
Edward M. Lindsey
Box 524
Henderson C. Lindsey
Box 279
Floyd J. Logan
Box 1769
William E. Logan
309 Hatten Building
Ernest G. Martin, Jr.
P. O. Box 730
James M. McCarthy
Box 10
Joseph R. Meadows
Suite 100, 2120 Building
R. B. Meadows
Box 402
Robert H. Milner, Jr.
P. O. Box 579
Webb M. Mize
310 Gulf National Bank
Building
John S. Morris
1214 24th Avenue
George E. Morse
P. O. Box 100
Stanford E. Morse, Jr.
P. O. Box 100
Sherman L. Muths, Jr.
Albert Necaise
Courthouse
Paul M. Newton
2414 Fourteenth Street
H. G. O'Conor
4512 Jefferson Avenue
Edgar L. O'Neill, Jr.
2513 Palmer Drive
Joseph Sam Owen
Box 673
Owen T. Palmer, Jr.
P. O. Box 717
Robert D. Portwood
P. O. Drawer 760
George M. Quin
454 Champin Street

William M. Rainey
P. O. Drawer S
James Norman Randall, Jr.
P. O. Box 749
George Grover Rayborn, Jr.
211 Bridges Building
Brent A. Richardson
P. O. Box 4051
Donnie D. Riley
Suite 100, 2120 Building
Grover Roberts
Box 992
Thomas N. Roberts, Jr.
P. O. Drawer Y
Jimmie W. Rose
1255 24th Street
George Rosetti, Jr.
P. O. Drawer Y
Scotty R. Rosetti
Box 1297
Ernest L. Shelton, III
Box 631
James Sideris
Box 819
Donald O. Simmons
P. O. Box 1206
George R. Smith
Box 177
Lee R. Spence
Trust Department
Hancock Bank
Thomas L. Stennis, II
P. O. Box 10
William L. Stewart
P. O. Box 717
Ben H. Stone
P. O. Drawer H
Thomas B. Sumrall
Hatten Building
Charles T. Sykes, Jr.
1225 Thirty First Ave.
Robert L. Taylor
P. O. Box 730
Jerry O. Terry, Sr.
Suite 308 Gulf National Building
Hollis C. Thompson, Jr.
310 Gulf National Bank Building
McRae Turner, Jr.
Mississippi Power Co.
Dr. Fred Haden Walker
400 Pass Road
Judge Harry G. Walker
P. O. Box 1529
Knox W. Walker
408 Hewes Building
Gerald M. Warren
Box 1506
Knox White
P. O. Drawer 100
Neil W. White, Jr.
412 Hewes Building
Marguerite L. Williams
1805 19th Avenue
Richard L. Yarbrough
P. O. Box 1138
Ralph D. Young
P. O. Drawer Y

GUNTOWN

James W. Bingham
Box 25

HATTIESBURG

Lawrence D. Arrington
Box 1292
Robert E. Arrington
P. O. Box 22
Bruce C. Aultman
P. O. Box 750
Dorrance Aultman
P. O. Box 750
B. H. Baker
Box 801
Stone D. Barefield
121 West Front Street
J. C. Bell
P. O. Box 566
M. D. Brett
P. O. Box 189
Giles Wheeler Bryant
3801 Pearl Street
Robert L. Calhoun
Box 1933
Lester Clark
302 First Federal Building
Judge Harold B. Cubley
P. O. Box 969
Edward J. Currie, Jr.
P. O. Box 2044
George Gibon Currie
Box 626
George C. Curry
P. O. Box 1709
Malcom Ronald Doleac
Box 1169
James K. Dukes
P. O. Box 2055
S. Wayne Easterling
P. O. Box 870
Henry King Farmer
P. O. Drawer 1390
Samuel E. Farris
1304½ West Pine St.
James Finch
P. O. Box 1169
Lawrence Y. Foote
Drawer 1231
Davis T. Fortenberry
Route 3, Box 186
Herbert R. Ginsberg
First Federal Building
Suite 304
Mayor Paul E. Grady
Box 1769
Reginald A. Gray, Jr.
Drawer 1975
Reginald A. Gray, III
Drawer 1975
John S. Grove
Box 1024
Wallace R. Gunn
Suite 102
Family Reserve Life Bldg.
Judge Stanton A. Hall
P. O. Box 135
William Haralson
P. O. Box 2054
F. C. Hathorn, Jr.
Box 865
Rowland W. Heidelberg, Jr.
301 West Pine Street
Robert E. Hill
702 Myrtle Street
Paul H. Holmes
P. O. Box 2055
John Roane Howell
518 Rebecca Avenue

Carroll H. Ingram
Box 24
Robert T. Jackson
Drawer 1975
Rex K. Jones
P. O. Box 125
William F. Jones
Box 95
Marie P. Kepper
702 West Pine Street
Karl W. Kepper
702 West Pine Street
Joe R. King
Box 1207
Raymond L. Laakso
Route 10, Box 99
University Place
John Wincie Lee, Jr.
Box 654
Jolly W. Matthews
P. O. Box 24
James F. McKenzie
301 West Pine Street
Richard W. McKenzie
Box 1403
Frank Wilson McLendon
417 Meadowlake Village
Richard L. Miller
3002 Prince George Road
Frank D. Montague, Jr.
Drawer 1975
Alfred Moore
Box 95
Henderson A. Moore
Box 95
C. M. Morgan, Jr.
Box 1333
Forrest M. Morris, Jr.
142 East Front Street
John Alan Morris
Box 109
William V. Murry
204 Conner Building
Larry Norris
401 South Main Street
Mildred W. Norris
P. O. Box 1633
Thomas D. Ott
P. O. Box 1386
Judge Howard L. Patterson
P. O. Box 808
William Lawrence Peebles
3308 Adeline Street
Edwin Lloyd Pittman
Carter Building
Jack Homer Pittman
Suite 407 Carter Building
James C. Pittman
Suite 407 Carter Building
Moran M. Pope, Jr.
P. O. Box 750
William F. Porter
Box 2059
Southern National Bank
Thomas J. Riley
P. O. Box 654
M. M. Roberts
Box 870
Shelby R. Rogers
P. O. Box 109
Donald B. Ruiz
Route 2, Box 394-A
Milton A. Schlesinger
Suite 304
First Federal Building
Elliott E. Schlottman
P. O. Box 1902
J. B. Van Slyke, Jr.
Box 750
Luther A. Smith
Box 1386
Billy H. Stephens
Box 1606
Howard M. Stroud
Box 24
Michael David Sullivan
306 Carter Building
R. M. Sullivan
112 East Front Street
Dan Gary Sutherland
Second Floor
301 West Pine Building
301 West Pine Street
James H. C. Thomas, Jr.
Suite 210, Carter Bldg.
Melvin M. Thomas, Jr.
200 29th Avenue
Joe A. Thompson
Box 348
James K. Travis, Jr.
P. O. Box 590
Thomas Ward Tyner
Box 750
Jack B. Weldy
P. O. Box 24
Ben M. West
1208 Carter Drive
William W. Wicht, Jr.
Suite 100
Professional Building
Francis T. Zachary
P. O. Box 24

HAZLEHURST

S. E. Allen, Jr.
P. O. Box 208
Cecil L. Allred, Jr.
408 Gallatin Street
John T. Armstrong
P. O. Box 190
John T. Armstrong, Jr.
P. O. Box 190
E. R. Arrington
Drawer 650
Donald C. Cooley
P. O. Box 388
Harris B. Henley
Box 509
W. S. Henley
Box 509
Harry O. Hoffman, Jr.
Box 190
Carroll Kemp
P. O. Box 226
Julius L. Lotterhos, Jr.
Box 509
Charles A. Ray, Jr.
Box 862
Lena C. Zama
P. O. Box 108

HEIDELBERG

John M. Sims
Box 412

HERNANDO

James Ward Amos
19 Union Street
William W. Ballard
Desoto County

Dudley Black Bridgforth, Jr.
C/O Walker Franks & Rone
Gerald Wilborn Chatham, Jr.
53 East Center Street, S E
Ross Lee Franks
Boyce Lee Garner
19 Union Street
Harry Randolph Garner
19 Union Street
William F. Hagan, Jr.
Box 346
F. C. Holmes, Jr.
Richard J. Lee
P. O. Box 373
Jon Bartlett Love
19 Union Street
Cinclair May
19 Union Street
George S. McIngvale
William L. Rone
Joel P. Walker
Edward Lee Whitten
19 Union Street
W. E. Wilroy
Box 5
W. E. Wilroy, Jr.
Box 5
James E. Woods
McIngvale Building

HICKORY

S. E. McGee

HOLLANDALE

William T. Bundy
503 Church Street
John Robert Nunnery, Jr.
616 Church Street
Forrest Durwood Ruegger
P. O. Box 542

HOLLY SPRINGS

Fred M. Belk, Jr.
Box 475
John W. Bryant, Jr.
Merchants & Farmers Bank Building
Robert P. Crutcher
Box 66
Wall Doxey, Jr.
P. O. Box 667
L. Glenn Fant, Jr.
P. O. Box 66
Sidney L. Hurdle
First State Bank Building
William G. Kemp
Box 266
John L. Kennedy
North Side of Square
D. Rook Moore, III
P. O. Box 66
George H. Rather
Fred E. Swaney
Van Dorn Avenue
James W. Warren, Jr.
Box 417

HOUSTON

Woodrow Wilson Brand, Jr.
Box 128
Thomas B. Davis
432 South Jackson Street
John P. Fox
P. O. Box 167
James S. Gore
P. O. Box 367
A. E. Hawkins
Box 266
James M. Hood, Jr.
Box 246
Rex Franklin Sanderson
Box 167

INDIANOLA

Richard M. Allen
P. O. Box 688
W. Dean Belk, Jr.
P. O. Box 229
Joe M. Buchanan
P. O. Box 654
Judge Arthur B. Clark
Box 229
Frank O. Crosthwait, Jr.
100 Court Street
Howard Q. Davis
Box 229
Howard Q. Davis, Jr.
Box 229
Aaron M. Edwards
210 Sunflower Avenue
Don Oliver Gleason
P. O. Box 1018
John T. Haltom
Box 654
Hugh Lumpkin
705 East Gresham Street
Gordon L. Lyon
100 Court Street
J. H. Price
David M. Quinn, Jr.
Box 175
G. P. Ritchey
Box 628
Champ T. Terney
100 Court Street

ISOLA

John Walter Garrard
P. O. Box 173

ITTA BENA

Cleveland Davis
Box 543
George H. Dulin
313 Lakeshore Street
Perry W. Morton
Box 82

IUKA

Richard O. Clark
P. O. Box 319
James Barry Finch
Box 335
J. D. Finch
Harold Stephen Jackson
Box 319
William Carr Lowrance
Route 4
Hubert D. Stephens
Box 319
Cecil L. Sumners
311 South Fulton Street

JACKSON

Annie Lou Abel
2914 Shelia Drive
Thomas G. Abernethy, Jr.
5811 Kings Place
James Milton Abram
121 North Farish Street
Jesse R. Adams, Jr.
Box 504

L. M. Adams
5025 Wayneland Drive
Apt. C-4
Virgil C. Adams, Jr.
1645 Meadowbrook Road
Lee B. Agnew, Sr.
418 Yazoo Street
Lee Bryant Agnew, Jr.
5573 Hartsdale Drive
John E. Aldridge
Box 1699
Chalmers W. Alexander
Box 291
Firnist J. Alexander, Jr.
2205 Guynes Avenue
James Alexander, Jr.
Box 410
Julian Alexander
Box 1367
Paul G. Alexander
401 Barnett Building
William A. Allain
P. O. Box 220
James E. Allen
P. O. Box 1200
Leigh B. Allen, III
P. O. Box 119
Michael S. Allred
Box 157
Sam S. Allred
405 Tombigbee Street
Patricia Ann Almon
1816 Parkridge Drive
Alex Alston
Drawer 1532
Lester Alvis, Jr.
P. O. Box 1507
Daniel Thomas Anderson
P. O. Box 263
Reuben Vincent Anderson
1206 Dewey Street
Carl F. Andre
4445 Audubon Park Dr.
Lloyd Arnold
Box 22622
George M. Arthur
5705 Ridgewood Road
Ronald Neely Ashley
1455 Dianne Drive
B. Galloway Austin
217 South State Street
Roy G. Ayles
2429 Nottingham Road
William A. Bacon
Box 15
James T. Baggett
5655 Clinton Boulevard
Fred L. Banks, Jr.
Drawer 290
Taunya Marita Banks
2361 Montbella Drive
Ray Bailey
Box 136
Louis G. Baine
Box 22489
Maston L. Ballew, III
Box 2344
Mills Eugene Barbee
540 East Northside Drive
Judge Charles T. Barber
County Court House
Frank D. Barber
Box 849
Harold J. Barkley, Jr.
Box 1482
Judge James A. Barnett
Box 686
Robert G. Barnett
Box 1200
Ross R. Barnett
P. O. Box 1288
Ross R. Barnett, Jr.
Box 1288
William Ralph Barnett
611 Barnett Building
Catherine L. Barter
Box 22547
Billie R. Barton
1256 Wooddell Drive
David C. Barton, III
Box 395
Stephen L. Beach, Jr.
P. O. Box 663
Stephen L. Beach, III
P. O. Box 663
Loyd Lamar Beacham, Jr.
822 Plaza Building
Wirt Adams Beard
715 North State Street
Bobby Ray Beatty
3323 Lisa Drive
James A. Becker, Jr.
Box 650
Thomas A. Bell
P. O. Box 1084
J. A. Bellan, Jr.
P. O. Box 3609
Marshall G. Bennett
282 Sun Drive
Richard Girsham Bennett
Box 1972
Richard Thomas Bennett
P. O. Box 326
Walter Berry
Box 1199
Robert A. Biggs, Jr.
P. O. Box 1370
Richard A. Billups, Jr.
P. O. Box 1056
Alvin Binder
P. O. Box 25
Melvin B. Bishop
Box 2366
Walter R. Bivins
235 Cooper Road
D. Carl Black, Jr.
Box 22567
Maurice Black
P. O. Box 220
William P. Black
5939 Baxter Drive
Jerry William Blakeney
Box 5025 Fondren Station
Jack W. Blasingame
Box 9463
Northside Station
Jerry H. Blount
Suite L
120 Capitol Towers
Jerry Holmes Blount
Box 2366
Singleton Smith Bonner
Box 528
Grover L. Boone
1029 Eculid Avenue
James A. Boone
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Barnett Building
Francis S. Bowling
425 Tombigbee Street
Hartwell Bowling
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Richard C. Bradley
406 Rollingwood Drive
Richard C. Bradley, III
406 Rollingwood Drive
Joe Alister Brady, Jr.
987 East Northside Drive
Apt. 5-2B
Judge Tom P. Brady
New Capitol
Bill Claud Breazeale
Box 9461 North Station
Dan E. Breland
P. O. Box 765
Charles A. Brewer
P. O. Box 1631
Thomas J. Brewer, Jr.
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Billy G. Bridges
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233 North Farish Street
Charles L. Brocato
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Harmon W. Broom
Box 1275
R. H. Broome
P. O. Box 5915
Jackson Martin Brown
155 South Green
Joseph E. Brown, Jr.
Box 2091
J. T. Brown
P. O. Box 291
Perry E. Brown
4214 Oak Hill Drive
R. Jess Brown
125½ North Farish Street
William Howard Brown, Jr.
690 First National Bank
Building

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4730 Shadow Wood Drive
Douglas H. Brumfield
165 Carmel Avenue
E. L. Brunini
P. O. Box 119
Edmund Lawrence
Brunini, Jr.
P. O. Box 119
Henry Warren Bryan
Box 391
Clifton E. Bryant
4250 Athens Drive
Noel W. Buckley
1251 First Avenue
Cary E. Bufkin
Box 157
James D. Buford
Box 157
Donald V. Burch
Box 1084
Delos H. Burks
New Capitol
Robert Burns
P. O. Box 131
Jack C. Burrell
P. O. Box 78
W. A. Busby
754 North President
Charles Crawley Bush
Box 12116
George H. Butler
Box 22567
Wilton Vance Byars
1617 Wilhurst Street
Frank Cabell
430 South Farish Street
Joseph B. Cadwallader
245 Sykes Road
James M. Cain
Box 12447
James E. Caldwell
1230 Saint Ann Street
T. Eugene Caldwell
P. O. Box 1704
K. Hayes Callicutt
Box 157
Robert C. Cannada
Box 22567

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Natie P. Caraway
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Taylor Carlisle
756 East Northside Drive
Charles Collier Carlton
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Geraldine H. Carnes
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Lyle Carroll
P. O. Box 1136
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P. O. Box 2216
William O. Carter, Jr.
P. O. Box 651
Craig Castle
P. O. Box 566
Edward L. Cates
P. O. Box 2005
Vernon Henry Chadwick
711 Electric Building
Reynolds Cheney
Box 1666
James K. Child, Jr.
Box 651
W. M. Childress
P. O. Box 12
Bernard W. Chill
P. O. Drawer 2427
Clifford C. Chittim
Box 427
Anson Bob Chunn
2419 Nottingham Road
James Steven Chustz
1840 Devine Street
Judge Charles Clark
United States Court
House
Grover C. Clark
140 West Pearl Street
Hollis M. Clark
135 Sivley Avenue
John Clark
Box 1084
Neal Clement
1411-13 Standard Life
Building

James L. Clemons
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William Thad Cochran
P. O. Box 650
J. W. Cocke
1339 Deposit Guaranty Bank Building
Dr. John V. Cockrell
1816 St. Ann Street
Marvin A. Cohen
P. O. Box 427
Curtis E. Coker
Box 1084
Walter D. Coleman
754 North President St.
William Dewitt Coleman
828 Briarfield Road
William F. Coleman
425 Tombigbee Street
Aline J. Collum
416 Plaza Building
James Ousley Conner
821 Madison
Henry D. Cook
1216 Raymond Road
Robert F. Cooper, Jr.
1335 Linden Place
James P. Cothren
425 Tombigbee Street
John R. Countiss, III
P. O. Box 241
Hansell August Courtney
1239 Deposit Guaranty National Bank Building
Bobby Louis Covington
P. O. Drawer 2428
Tom Coward, Jr.
Box 22547
Justin Lamar Cox
P. O. Box 22489
Judge William Harold Cox
P. O. Box 2447
William Harold Cox, Jr.
Suite 1741 Deposit Guaranty Bank Building
Merrida Powell Coxwell
P. O. Box 10332
John A. Crawford
Box 22567
Robert A. Crawford
418 Yazoo Street
James Hiram Creekmore
628 Electric Building
Rufus Creekmore
822-25 Plaza Building
Wade H. Creekmore
1000 Plaza Building
Wade H. Creekmore, Jr.
628 Electric Building
Thomas R. Crews
P. O. Box 410
Alfred N. Crisler
431 Tombigbee Court Square
Bert Crisler
813 Deposit Guaranty Bank Building
Charles W. Crisler, Jr.
431 Tombigbee Court Square
Tom Crockett
Box 22628
Earl R. Cruthirds
4580 Old Canton Road
E. Hugh Cunningham, Jr.
P. O. Box 1288
Danny Cupit
Box 916
Arthur Dale Currie
Box 1322
William M. Dalehite, Jr.
Box 651
Joe H. Daniel
Box 1084
Dale Danks, Jr.
623 Bankers Trust Plaza Building
R. A. Darden
3438 Old Canton Road
Thomas Edwin Davidson
Box 663
Charles R. Davis
Drawer 1532
Jack Roy Davis
814 North Jefferson St.
Colonel James L. Davis
110 Poinciana Drive
Walter Dell Davis
406 Farm Bureau Federal Building
Joe Sanford Deaton
4243 Meadowlane Drive
Joe Dehmer, Jr.
Box 1012
Henry Lee Denton, Jr.
5372 Jamaica Drive
Albert Dickens, Jr.
Box 744
R. R. Dinsmore
4096 Redwing Avenue
John Kane Ditto, Jr.
1517 St. Ann Street
J. Hubern Dodd
Box 92
Warren C. Dorsey, Jr.
Box 1200
Richard W. Dortch
P. O. Box 119
James K. Dossett
1801 Deposit Guaranty Bank Building
James K. Dossett, Jr.
1801 Deposit Guaranty Bank Building
John H. Downey
611 Barnett Building
William Gerald Duck
914 Poplar Boulevard
Douglas R. Duke
Box 157
Vardaman S. Dunn
Suite 1741 Deposit Guaranty Bank Building
Bradford J. Dye, Jr.
1948 Cherokee Drive
William Jeff East
4815 North State Street
Woods E. Eastland
Drawer 119
Al D. Eatmon
300 Church Building & Savings Association Bldg.
Barney Edward Eaton, III
P. O. Box 2448
John Arthur Eaves
Plaza Building

Richard Mack Edmondson
P. O. Box 326
W. Edward Ellington
Box 504
Joseph B. Elliott
Box 22527
Phil Embry
4851 Maplewood Drive
Lura Clark Ethridge
P. O. Box 119
Clyde V. Eubanks
P. O. Box 10087
Don Evans
Box 1695
George Q. Evans
Box 651
William D. Evans
202½ West Capitol
R. D. Everitt
507 North Park Drive
Jack H. Ewing
P. O. Box 330
Michael P. Fedorak, Sr.
V A Center Room 119-D
Bethel Ferguson
Mississippi Power & Light
Douglas Mims Ferris
1770 Douglas Drive
Robert D. Findley
Box 743
Grey Flowers
Box 2022
Henry G. Flowers
P. O. Box 609
Howard Curtis Flowers, Jr.
P. O. Box 95
W. B. Fontaine
1623 Deposit Guaranty
Bank Building
Harry Lanier Beach Foote
3601 Terry Road
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609 Plaza Building
Cecil A. Ford
Suite 690 First National
Bank Building
James Richard Ford
Box 1288
Richard Lamar Forman
Box 22567
Earl Ford Fortenberry, Jr.
Mississippi State Senate
New Capitol Building
John D. Fournet
P. O. Box 1031
John H. Fox, III
Box 22547
Lawrence J. Franck
Box 22567
J. B. Franklin
P. O. Box 12
Lawrence C. Franklin
Box 444
Kenneth I. Franks
690 First National Bank
Building
Benjamin Rolling Freeman
Box 1131
Billy L. Fulgham
831 Madison Street
Apt. K-25
Gabriel M. Fuqua
Box 1083
Louis A. Fuselier
P. O. Box 95
Joe Dewitt Gallaspy
823 Winn Street
Sara Edith Gallaspy
823 Winn Street
Sam Hooper Gammill
812 Gillespie Street
Evelyn Gandy
727 Arlington Street
James L. Garner, Jr.
1304 Riverwood Drive
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4561 Meadow Hill Road
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Box 651
Arthur G. Gearheard, III
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P. O. Box 157
Charles E. Gibson, III
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Building
P. Olney Gibson, Jr.
Box 743
A. Spencer Gilbert, III
Box 651
Karen Annette Gilfoy
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P. O. Box 4271
Judge R. G. Gillespie
New Capitol Building
Robert G. Gillespie, Jr.
Box 1729
Thomas P. Givens
Box 1225
Henry Davis Golden
114 Elcrest
William F. Goodman
P. O. Box 650
Paul Roger Googe, Jr.
5115 Shirlwood Drive
Weaver E. Gore, Jr.
Box 186
John G. Gourlay, Jr.
P. O. Box 427
William A. Gowan, Jr.
P. O. Box 22547
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107 South Farish Street
Robert S. Graham
Box 1841
Brelon E. Grantham, Jr.
Box 1773
R. Gordon Grantham
P. O. Box 119
Charles L. Graves
185 Thompson Street
Elizabeth W. Grayson
P. O. Box 650
Elmore D. Greaves
P. O. Box 426
Garner W. Green, Jr.
Box 1666
Joshua Green
Box 1666
David Benjamin Grisham
Box 427
John M. Grower
Box 119
Judge Carl E. Guernsey
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Claude W. Guice
4313 Ridgewood Road

Lundy R. Gunn
Box 16164
V. Douglas Gunter
514 Barnett Building
James Watkins Haddock
Box 220
Charles C. Hairston
Box 1269
Carsie A. Hall
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Joe W. Hobbs
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Heber Austin Ladner, Jr.
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Box 1695
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W. Baldwin Lloyd
903 1st Nat. Bank Bldg.
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Box 157
Jerome Lee Lohrmann
Box 25
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1727 St. Ann
Glenn M. Longino
829 Arlington Street
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Jack H. Lucas
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Box 663
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Lauch Magruder, Jr.
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J. Morton Matrick
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James Dent May
Box 2216
M. Charles May
Box 1704
Rose P. May
540 Woodbury Road
Walter Dent May
P. O. Box 42
Velia Ann Mayer
Box 650
Charles R. Mayfield, Jr.
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Robert Travis McAdory
P. O. Box 2599
Robert C. McAllister
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David M. McMullan
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Robert Rex McRaney
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George D. Meek
619 Mohawk Avenue
Charles Walter Middlebrook
Box 1972
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518 East Capitol Street
Harold D. Miller, Jr.
Box 22567
Jimmy Lynn Miller
113 Millsaps Plaza

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William Edward Miller, II
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Bonnie Mills
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1305 Woodcrest Dr.
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Milton H. Mitchell
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P. O. Box 1288
Samuel A. Montgomery
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Gid Montjoy, IV
Box 724
Charles O. Moore
Box 16125
E. Don Moore
Box 10087 Northside Sta.
Frank T. Moore, Jr.
Box 22489
Judge Russel D. Moore, III
P. O. Box 171
Stephen Owen Moore
First National Bank Bldg.
William S. Moore
514 Barnett Building
Donald Morrison
P. O. Box 22628
Dan W. Morse
604 Bankers Trust
Plaza Bldg.
W. E. Morse
601 Bankers Trust
Plaza Bldg.
Henry H. Mounger
P. O. Box 1821

William H. Mounger, Jr.
P. O. Box 1651
Jean Denman Muirhead
Box 8742
Adrian E. Mullen
1746 Hillview Drive
Thomas Earl Mullen
P. O. Box 2026
Peggy G. Mullins
644 Benning Road
Thomas M. Murphree, Jr.
4205 Brookdale
John Herr Musser, IV
327 Briarwood Drive
Eric G. Myers, Jr.
Box 6882
James Houston Neal, Sr.
1954 Camellia Lane
James H. Neeld, III
P. O. Box 2960
William H. Neely
P. O. Box 78
William T. Neely
P. O. Box 17
Frank Pemberton Nelson
Box 1972
Hugo Newcomb
New Capitol Building
Hugo Newcomb, Jr.
Box 3728
James W. Newman, III
328 1st Nat. Bank Bldg.
John A. Nichols
Drawer 290
Robert G. Nichols, Jr.
Box 1526
Samuel J. Nicholas, Jr.
1650 Robert Drive
Wayne L. Nix
P. O. Box 291
Ed Davis Noble, Jr.
Box 220
Henry Russell Nobles
Box 1012
James W. Nobles
Box 1288
J. T. Noblin
Box 4452
W. C. Noblin
Box 2186

David H. Nutt
Drawer 1532
James W. O'Mara
Box 22567
Junior O'Mara
P. O. Box 22567
John Mack Osborne, Jr.
724 Chickasaw
Emile C. Ott
P. O. Box 95
N. W. Overstreet, Jr.
P. O. Box 961
Harry Dale Owen
Box 175
Oran Charles Page
Box 22571
Derek Parker
Box 1176
Jack S. Paker
220 Edgewood Terrace
Apt. G-26
Richard Wayne Parker
Box 16111 McWillie Sta.
Mackie Paschal
1047 Sylvian Street
Billy Wayne Patridge
206 Stewart Circle
Judge J. Neville Patterson
New Capitol Building
William N. Patterson
6254 Mossline Drive
W. R. Patterson
626 Newland Street
Marry Libby Payne
110 New Capitol Bldg.
Thomas B. Payne
4801 No. State St.
James A. Peden, Jr.
Box 673
Charles Pendelton
Box 427
John L. Penny
313 Wacaster
Kenneth Giles Perry
Box 157
Robert Perry
Box 22628
James Brady Persons
1801 Deposit Guaranty
Bank Bldg.

Edward J. Peters
Box 864
M. J. Peterson
Box 727
Ellen L. Pfister
Box 521
C. Alton Phillips
Box 427
Rubel L. Phillips
P. O. Box 22628
James A. Phyfer
501 East Pearl St.
George B. Pickett, Jr.
Box 59
W. W. Pierce
300 Shamrock Bldg.
Bob W. Pittman
P. O. Box 1849
John R. Poole
513 Plaza Building
Barry H. Powell
Box 22571
Gilbert Bailey Powell
P. O. Box 8153
Roy D. Powell
Box 22493
Thomas W. Prewitt
Box 22567
John H. Price, Jr.
P. O. Drawer 1532
Murry Price
4226 Fairfax Avenue
Thomas Bennett Price
126 South President
Robert A. Pritchard
300 Shamrock Building
Fred H. Purser, Jr.
821 Timberlain Drive
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William A. Pyle
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139 Highland Circle
John D. Quarles
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Drawer 119
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Richard M. Richardson, Jr.
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Charles C. Richmond
2601 Lake Circle Drive
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P. O. Box 187
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1431 Canton Mart Road
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911 Pinehurst
Richard Baxter Wilson, Jr.
P. O. Box 651
William F. Winter
P. O. Box 427
Sherwood W. Wise
Box 651
Larry W. Wood
310 Southbrook Drive

W. Wayne Wood
5952 Waverly Drive
George F. Woodliff
690 1st Nat. Bank Bldg.
Thomas H. Woodrow
4929 Clinton Boulevard
Roy Houston Woody, III
275 Roseneath
Charles S. Wright
P. O. Box 2201
W. Swan Yerger
690 1st Nat. Bank Bldg.
Rice P. York
Box 22511
Frances M. Young
P. O. Box 263
Jack H. Young
Box 3543
Jack H. Young, Jr.
3760 Brinkley Drive
James Leon Young
930 Deposit Guaranty
Bank Bldg.
J. Will Young
930 Deposit Guaranty
National Bank Bldg.
Robert James Young
1802 Howard
Frank M. Youngblood
Box 1567
Thomas Lee Zebert
404 North Biederman
Road Pearl
John B. Zuccaro
3344 Santa Rosa Street

JONESTOWN

M. M. Butler
Box 187

KOSCIUSKO

John Percy Allen
300 N. Jackson St.
William D. Brooks
105-07 S. Madison St.
David E. Crawley, Jr.
Crawley Building
George Lee Dorrill
Box 101
William Reynolds Ford
Crawley Building
D. H. Glass
P. O. Box 746
John D. Guyton
105-07 South Madison St.
Chatwin M. Jackson, Jr.
Box 27
John C. Love, Sr.
P. O. Box 527
John C. Love, Jr.
P. O. Box 527
Alton Massey
Box 189
Ray S. Mikell
P. O. Box 658
Clarence E. Morgan, Jr.
Box 721
Clarence E. Morgan, III
108 East Washington St.
Hugh Swinton Potts, Jr.
Box 637
John E. Shaw
112 Cedar Lane Drive
William W. Smith
Box 176
G. J. Thornton
Morgan & Lindsay Bldg.
Harold W. Williams
517 Lucas Street
Claude Jackson Woodward
Doty Building

LAKE CORMORANT

Isaiah Madison
General Delivery

LAMBERT

Walter E. Dreaden, Jr.
P. O. Box 215
Thomas Sharp
Hoke Stone

LAUREL

E. R. Alley
Box 2744
Ray D. Baldwin
3815 Baldwin Drive
Woodrow W. Barham, Jr.
720 26th Street
E. C. Bonney
P. O. Box 957
H. Harvey Breazeale
2018 Briarwood Drive
Ronald C. Brown
Box 171
Kenneth Bullock
Box 2008
John A. Bruce Caldwell
P. O. Box 362
J. Edwin Campbell
Box 584
Lunsford Casey
P. O. Box 185
Leonard B. Caves
28 Northgate
Fledell Chain
48 Oakcrest Drive
Thomas Gene Clark
P. O. Box 731
Elson K. Collins
Box 732
Edwin P. Connolly
P. O. Box 525
Billy M. Davis
Route 3, Box 545
Henry S. Davis, Jr.
P. O. Box 1137
William M. Deavours
P. O. Box 106
W. O. Dillard
P. O. Box 286
Michael Thomas Elias
Box 2008
Sarah L. Entrekin
768 Northwood Drive
E. Brooke Ferris, III
Gardiner Center Offices
Carl Dexter Ford
Room 303 Wallace Bldg.
C. Denton Gibbes, Jr.
Box 2008 Choctaw Sta.
Stewart J. Gilchrist
P. O. Box 106
Ernest W. Graves
Box 2008 Choctaw Sta.
Matthew Harper, Jr.
P. O. Box 726
James D. Hester
Box 713
Thomas J. Holifield
Box 726

W. Major Holifield
P. O. Box 901
Jones H. Hoskins
Box 841
John Leonard Jeffries
P. O. Box 844
Harry E. Koch
P. O. Box 2455
David H. Massey
311 N. Fifth Avenue
George D. Maxey
P. O. Box 731
Franklin Cooper McKenzie, Jr.
Box 42
Apheus Holland McRae
Box 65
Harold W. Melvin
Box 142
Leonard B. Melvin, Sr.
Box 142
Leonard B. Melvin, Jr.
Box 142
Judge Goode Montgomery, Jr.
P. O. Drawer 5
Humphrey C. Moynihan
Box 222
William S. Mullins, III
P. O. Box 2008
Choctaw Station
William Harold Odom
Box 354
L. A. Pacific
P. O. Box 1860
Samuel V. Pack
P. O. Box 706
Charles W. Pickering
P. O. Box 713
L. Percy Quinn
Box 1085
Kalford C. Ratcliff
P. O. Box 706
Robert Lamar Rogers, Jr.
Box 2008
Quitman Ross
P. O. Box 464
A. S. Scott, Sr.
P. O. Box 403
A. S. Scott, Jr.
P. O. Box 403
Donald Allen Smith
Box 1492
Philip E. Stevens
Box 434
J. Robert Sullivan, Sr.
Box 1131
William B. Sullivan
Box 41
William W. Sumrall
Box 726
Jon A. Swartzfager
P. O. Box 121
Paul G. Swartzfager
Box 121
Raymond C. Swartzfager, Jr.
P. O. Box 65
Lowell W. Tew
Box 732
C. H. Walker
Box 762
Guy M. Walker
Box 41
J. Larry Walters
Box 713
Milton B. Weems
Box 106
Raynold Lee Willett
Box 305

LEAKESVILLE

Curtis Breland
P. O. Box 706
T. Horton Hillman
Box 555

LELAND

Edward Joshua Bogan, Jr.
Broad Street
Robert E. Hilton
310 4th Street
William B. Waits
P. O. Box 128
Burrell O. McGee
209 Broad Street
John C. Webb
P. O. Drawer 392

LEXINGTON

John William Barrett
Box 149
Pat M. Barrett
P. O. Box 149
Pat M. Barrett, Jr.
P. O. Box 149
J. R. Gilfoy
P. O. Drawer 30
William L. Jordan
Box 415
G. H. McMorrough
Edwin Tye Neilson
Box 448
Marshall H. Smith
H. Edwin White
Box 179

LIBERTY

T. F. Badon
P. O. Box 353
Mary Jo Poole Forman
P. O. Drawer L
Joe D. Gordon, Sr.
P. O. Box 268
Joseph D. Gordon, Jr.
P. O. Box 268
Kenneth Gordon
Box 373
F. W. Stratton
P. O. Box D

LONG BEACH

Albert E. Easterling, Jr.
123 Buena Vista Drive
Robert Oliver Homes, Jr.
101 Lang Avenue
James M. Maxwell, Jr.
400 Gulfview Avenue
Herbert J. Stelly, Sr.
900 West Old Pass Road

LOUISVILLE

R. W. Boydstun
Box 560
R. W. Boydstun, Jr.
Box 560
David E. Crawley, III
P. O. Box 543
Frank M. Deramus
Box 31
Grady Jyles Eaves
114 South Columbus Ave.
Charles D. Fair
P. O. Box 509

Terry M. Haimes
J. Hoy Hathorn
Masonic Building
James Cal Mayo
P. O. Box 509
Edward C. Prisock
Masonic Building
Neal Prisock
Masonic Building
Burris Olen Smith
P. O. Box 31
Gene Stringer
P. O. Box 328
David T. Wilson, Jr.
108 South Columbus Ave.
Henry C. Wood

LUCEDALE

James W. Backstrom
Box 713
Sidney A. Barnett
303 Summer Street
John Laverne Dale
P. O. Box 67
H. M. Hunter
Box 134
Darryl A. Hurt
P. O. Box 45
Maurice L. Malone
P. O. Box 208
Judge Darwin M. Maples
Box 75
J. O. Moss
P. O. Box 572
Andrew M. N. Murphy
Box 585
Williams S. Murphy
William Avery Wilkerson
Box 255

LUMBERTON

Michael R. Eubanks
P. O. Box 527
Bobby J. Garraway
Box 335
Joseph H. Montgomery
P. O. Box 392

LYMAN

Upton Sisson
P. O. Box 284

MACON

E. H. Britton
Ernest L. Brown
500 Jefferson Street
Leroy R. Kenneday
Jefferson Street
Charles G. Perkins
314 Wayne Street

MADISON

H. S. Owens
P. O. Box 7

MAGEE

T. M. Bishop
Box 623
L. R. Floyd
RFD 2 Box 122
Willis T. Matthews
103 Bankers Trust Bldg.
George Donald Runnels
113 N.W. First Street

MAGNOLIA

Judge Thad Leggett, III
P. O. Box 307
O. W. Phillips
225 East Bay Street
William Benjamin Regan
225 East Bay Street
B. D. Statham
110 N. Cherry St.
William F. Watkins
101 N. Cherry St.

MARKS

Ben M. Caldwell
P. O. Box 370
Partee L. Denton
331 Locust Street
Ellen E. Goldman
231 Chestnut
Ney M. Gore, Jr.
337 First Street
T. N. Gore
T. N. Gore, Jr.
301 Locust Street
Mose E. Kincaid
805 Third
Lomax Lamb, Jr.
Larry O'Keefe Lewis
Box 370

Eugene Thompson
P. O. Box 66

MATHISTON

Will P. Starnes
P. O. Box 33

McCOMB

Louis Alford
P. O. Box 489
Clinton Ashley Atkinson
P. O. Box 155
Robert W. Brumfield
P. O. Box 886
Charles Wayne Dowdy
Box 853
John B. Ewing
P. O. Box 428
Norman B. Gillis, Jr.
P. O. Drawer G
William S. Guy
P. O. Box 853
Judge Bert H. Jones
L. S. McClaren
324 New York Avenue
Dale Henry McDairtt
653 Nebraska Avenue
Gerald M. McMillan
P. O. Box 73
George Terrell Morgan
Box 998
Joe N. Pigott
Drawer P
Clyde Ratcliff
Box 81
R. B. Reeves
212 3rd Street
Robert S. Reeves
212 Third Street
J. Gordon Roach
Box 967
John Gordon Roach, Jr.
P. O. Box 506
Hansford L. Simmons
509 Caston
Drennen Michael Smith
P. O. Box 592
Wayne L. Sterling
Box 592
Laverne A. Varnado
P. O. Box 959

Thomas H. Walman
111 N. Front St.
John H. White, Jr.
P. O. Box 672
William A. Wiltshire
P. O. Drawer 527

MEADVILLE

L. L. Forman
K. Maxwell Graves, Jr.
P. O. Box 361
W. Wilson Hewitt
M. Bradley Lawrence
Nolan M. McCoy
Box 265
H. B. Mayes McGehee
P. O. Box 188
Judge James A. Torrey
James A. Torrey, Jr.
P. O. Box 188
Sanfred P. Torrey
P. O. Box 227

MENDENHALL

Thomas B. Alexander
Ras Milton Boyles
P. O. Box 576
Travis Hilton Bryant
122 Court Street
Grover C. Coleman
P. O. Box 402
A. K. Edwards
Box 66
Judge George B. Grubbs
Box 217
Isom C. Harrington
P. O. Box 181
Douglas M. Magee
Box 231
Aleita M. Sullivan
Box 575
Thomas H. Sullivan, Jr.
Box 37
Judge J. W. Walker
Connie S. Whitfield
127 South Main Street
George G. Williamson
Box 687

MERIDIAN

J. P. Abston
208 Lamar Building
Gerald Adams
Box 849
George W. Allen
Box 367
Brad B. Bailey
2314 17th Street
Robert Walter Bailey
509 21st Avenue
L. D. Beard
207-09 Lamar Building
Thomas D. Bourdeaux
Box 2009
Maxie Gene Brown
P. O. Box 305
Frank J. Buchanan
4257 Poplar Springs Dr.
F. Gerald Burnett
324 Citizens Nat. Bk. Bldg.
Joe G. Byrd
2810 - 7th Street, Apt. 8
Overton W. Cameron
Box 888
Robert D. Coit
P. O. Box 424
William Bond Compton
Box 845
Alfred E. Corey
P. O. Box 1413
Lyle V. Corey
Box 1413
J. Michael Corrigan, Jr.
413 Greater Miss. Life
Billy R. Covington
P. O. Box 1904
J. A. Covington
P. O. Box 786
Dal M. Crenshaw
Meridian Building &
Loan Bldg.
Robert H. Crook
Box 289
Thomas W. Dawson
Box 2009
Robert B. Deen, Jr.
Box 888
Aubert C. Dunn
P. O. Box 1745
Edwin A. Dunn
P. O. Box 1745
Cecil S. Edmundson, Jr.
P. O. Box 3125
Walter W. Eppes, Jr.
Meridian Building &
Loan Association
G. Rayner Gaillard
1000 20th Avenue
Champ C. Gipson
Box 804
Wingfield Glover, Jr.
P. O. Box 1389
C. Dennis Goldman
Box 1625
Thomas L. Goldman
Box 1625
Thomas W. Goldman, Jr.
Box 1625
Hardy P. Graham
2000 Country Club Dr.
William J. Gunn, Jr.
Meridian Building &
Loan Bldg.
Maurice Hinton Hall, Jr.
Box 1627
Robert Wallace Hamill
Box 5376
Joe Clay Hamilton
Box 5376
John M. Harmon
P. O. Box 1443
James Emerson Harwell, Jr.
Route 5, Box 378
Thomas M. Hendricks, Jr.
P. O. Box 1501
Thomas C. Hogan
402 25th Avenue
Thomas K. Holyfield
325 Lamar Bldg. Box 1928
Harry L. Hopkins
Route 8, Box 62-A
Philip D. Hughes
Box 1468
Alvis C. Johnson
Box 824
Granville Jones
Box 1562
Harris W. Sonny Jones, Jr.
Box 725
S. B. T. Jones
Box 5028

Thomas R. Jones, Jr.
P. O. Box 2009
Maurice F. Kahlmus
Box 5658
Dempsey G. Knight, Jr.
1308 22nd Ave. Heights
Irvin L. Martin, Jr.
Box 202
Jerry Gordon Mason
Citizens Nat. Bank Bldg.
Suit 426
Thomas Y. Minniece
Box 5376
S. R. Nettles
903 31st Avenue
Paul Mains Neville
Box 5376
Judge William Deb Neville
P. O. Box 908
Harold Noe
Box 2009
Joe R. Odom
P. O. Box 607
Henry Welch Palmer
2205 39th Avenue
Howard R. Pigford
P. O. Box 1501
Claude L. Pitts
300 Rosenbaum Building
James Nicholas Potuk
3409 35th Avenue
John Leslie Prichard
P. O. Box 888
Thomas Jefferson Prince, Jr.
Citizens National Bank
Lawrence W. Rabb
907 Greater Mississippi
Life Bldg.
Harvey Blanton Ray
Box 5633
William E. Ready
P. O. Box 927
Fred M. Rogers
1823 34th Street
Margaret E. Rogers
2612 19th Street
James Edgar Sandusky
Box 1754
Daniel P. Self, Jr.
Box 949
John Rex Shannon
Route 6, Box 131
C. D. Shields
P. O. Box 367
Dan S. Shipp
212 Lamar Building
James T. Singley
P. O. Box 5333
E. L. Snow
Box 786
James T. Speed
Box 5355
W. Arlo Temple
Box 786
Robert L. Tinsley, Jr.
Box 1327
Thomas R. Ward
P. O. Box 3007
George D. Warner, Jr.
Box 5633
Judge Homer C. Watkins
Box 1952
Thomas K. Watts
Box 786
Q. Earl Webb
411 Greater Mississippi
Life Bldg.
J. C. Wilbourn
Box 1389
Richard E. Wilbourn, II
P. O. Box 1389
J. Pat Wiley
Box 504
James D. Williams
Box 1389
Marvin Williams
Meridian Building &
Loan Bldg.
James E. Williamson, Jr.
P. O. Box 804
Judge Lester F. Williamson
P. O. Box 1501
N. S. Williamson
Box 86
Gibson B. Witherspoon
Box 845
Henry S. Woodall
Box 11
Ralph E. Young
P. O. Box 888

MONTICELLO

James Shelby George
Jack A. Morris
P. O. Drawer C
Robert Glenn Turnage
Box 325
Francis M. Vining
Box 250

MOORHEAD

Ben Himelstein

MORTON

James Thomas Farris
Drawer K

MOSS POINT

Charles B. Bratt
P. O. Box 461
Louis Fondren
167 Main Street
Frank J. Hammond, Jr.
Box 356
Robert T. Mills
P. O. Box 706
Richard E. Perkins, Jr.
Box 706

MOUNT OLIVE

Atticus A. Calhoun
Box 297

NATCHEZ

Lawrence Adams
P. O. Box 1307
Basil G. Ballard
P. O. Box 1443
Edwin E. Benoist, Jr.
P. O. Box 913
Frederick C. Berger
P. O. Box 1144
Judge Robert A. Bonds, Jr.
508 Main Street
David C. Bramlette
P. O. Box 1307
James M. Brandon
P. O. Box 1344
J. Walter Brown, Jr.
P. O. Box 1047
B. C. Callon
P. O. Box 640
Judge Curtis L. Collins

E. H. Fitzpatrick, Jr.
Box 226
Brent Forman
Box 1307
W. A. Geisenberger
Suite 7 Fry Building
John T. Green
110 South Wall Street
Thomas K. Green, Jr.
123 S. Commerce St.
Lucien C. Gwin, Jr.
Box 375
Lucien G. Gwin
Box 1384
G. Stuart Handy
P. O. Drawer 1344
Graham H. Hicks
Box 364
Oliver M. Hornsby
118 Fry Building
Eunice V. Johnson
P. O. Box 1322
Forrest A. Johnson
P. O. Box 1322
James H. Keyer
Lomond Building
Robert D. Lee
133 South Commerce
Anabel Y. Maxie
1016 Main Street
Thomas M. McNeely, Jr.
116 South Wall Street
Herman Bradford Miller, Jr.
8 Beechwood Lane
Keith Wayne Morton
P. O. Box 245
John E. Mulhean, Jr.
202 S. Wall St.
Clyde W. Mullins
133 South Cinnerce St.
Robert L. Netterville
Box 946
Daniel J. Obeirne
P. O. Drawer 1344
Thomas J. Obeirne
Box 330
C. F. Patterson
506 South Union Street
Claude Pintard, Jr.
P. O. Box 1047
Jack E. Pool
202 S. Wall St.
William F. Riely
P. O. Box 174
Harry L. Rosenthal
325 Main Street
J. Fred Schmidt, Jr.
304 Auburn Avenue
S. Barnett Serio, Jr.
Box 1207
Cecil Gill Smith, Jr.
133 South Commerce St.
William Marion Smith
Box 1307
Stanley Leroy Taylor, Jr.
115 S. Pearl St.
John Merritt Tipton
Fry Building
E. G. Truly
Box 1307
Frank W. Walden
Box 345
Edwin C. Ward
Box 1307
Calvin B. Wells
Fry Building
George Ferdinand West, Jr.
Box 1202
Robert Y. Wood, Jr.
Box 1047
Clarence N. Young
Box 1407
Leonard Albert Young
55 Seargent Prentiss Dr.
Joseph S. Zuccaro
Box 1047

NESBIT

Lee Virden Hamberlin
Route 1, Box 505

NEW ALBANY

J. E. Boone
Box 973
Hugh N. Clayton
Box 157
William G. Collins
Route 4
Tom Leslie Darden
Henry H. King
Box 184
Baxter N. Knox, Jr.
P. O. Box 336
Talmadge D. Littlejohn
Box 869
W. Lester McDonough
P. O. Box 186
John David Pennebaker
Box 96
William O. Rutledge, III
Route 4
Edgar J. Stephens, Jr.
P. O. Box 330
Lester F. Sumners
P. O. Box 123
Joseph T. Wilkins, III
Box 973

NEW AUGUSTA

John M. Dunnam, Jr.
Box 138

NEW HEBRON

Eugene Sexton Berry, Jr.
Box 111

NEWTON

D. M. Anderson
Box 7
Jack W. Brand
Box 380
W. A. Byrd
102 Byrd Street
R. S. Majure
Box 220
George S. Monroe
Box 28
Edmund J. Phillips, Jr.
Box 178
S. T. Roebuck
104 North Main Street

NORTH CARROLLTON

W. C. Neill
Peoples Bank & Trust Co.

OCEAN SPRINGS

B. O. Bailey, Jr.
Box 552
John R. Blossman
206 Shearwater Dr.

Lynden Bowring
207 Pershing Avenue
Judge L. C. Corban
P. O. Box 547
A. Y. Harper
P. O. Box 712
John L. Heiss, Jr.
Box 221
Oscar R. Jordan
914 Washington Avenue
George R. Lewis
Box 895
James R. Lockard
Route 1, Box 91
Russell Moran
P. O. Drawer AA
George S. Neal, Jr.
Box 901
Schuyler Poitevent, Jr.
James Russell Reed, Jr.
P. O. Box 836
S. B. Watkins
Route 3, Box 362-D
James Webster Wilson
1 Bay Sweep Circle

OKOLONA

Kenneth M. Burns
Box 309
Robert K. Coleman
H. L. Morrison
Walter M. Obarr
P. O. Box 309
John D. Sibley
Main Street

OLIVE BRANCH

Drue Birmingham, Jr.
Billy Don Hall
7155 Lamar Avenue

OVETT

John H. Shows
Route 1

OXFORD

Vettra Glen Alderson
P. O. Box 345
Robert Owen Allen
515 North 11th
Gordon Edward Baird
313 Van Buren
Dwight N. Ball
Box 566
Russell Blair
204 First National
Bank Bldg.
William Francis Bullock, Jr.
313 Washington Ave.
Extended
Richard Lamar Carlisle
Ewing Trailer Park
Gerald H. Center
1013 Jackson Avenue
William M. Champion
306 McLaurin
Robin O. Cotten
626 Park Drive
Omar Dell Craig
Box 163
William Peyton Dodson
P. O. Box 525
Angelo J. Dorizas
204 First National
Bank Bldg.
William M. Dye, Jr.
304 Murry Street
Robert T. Edwards
1001 Jefferson Apts.
T. Marx Huff
Box 190
Thomas R. Ethridge
P. O. Box 566
Anthony Fava
James Oliver Ford
North Mississippi Rural
Legal Services
Thomas H. Freeland, III
Box 269
Gerald A. Gafford
P. O. Box 269
Norman Gillespie
Asst. U.S. Attorney
Lowell E. Grisham
P. O. Box 566
Will A. Hickman
P. O. Box 430
Jere Richmond Hoar
Route 1
William Hooper, Jr.
1525 Jefferson
Charles D. Hosemann
235 Avent Apts.
Clyde Gray Huggins, Jr.
Box 8
William Walker Joor
Box 207
William P. Joyner
Lee Loop
Sam D. Knowlton
Old Taylor Road
William R. Lamb
P. O. Box 349
Alfred Eugene Lee
406 Thomas Street
William Lewis, Jr.
Box 31
James Stewart MacDonald
Route 5, Box 88
Anna Maddan
719 University Ave. #12
Maureen G. Malone
108½ South Lamar
Falton O. Mason, Jr.
819 Filmore
Nick A. Mavar, Jr.
209 Cullen Road
Thomas Richard Mayfield
108½ South Lamar
Robert E. Jack McCormick
426 South Lamar
Taylor H. McElroy
P. O. Box 269
Carl Venson Montgomery
619 University, Apt. 4
A. E. Moreton
110 Vivian Street
Casey Culpeper Pace
619 University Avenue
Fred Barringer Patton
518 Tyler Avenue
F. Edwin Perry
P. O. Box 345
J. W. Price
307 South Lamar
H. M. Ray
Box 191
Jean Rand Richey
Country Club Road
Basil W. Richmond, Jr.
426 South Lamar

Bramlett Roberts
Box 507
Alix Henry Sanders
108½ North Lamar
Francis B. Stevens
North Mississippi Rural
Legal Services
108½ South Lamar St.
Joseph Watts Yates
1590½ Buchanan Ave.

PASCAGOULA

Emily V. Baker
Box 1692
Glenn Barlow
P. O. Box 1241
W. E. Belt
P. O. Box 666
Vincent Blackwell
P. O. Box H
Raymond L. Brown
P. O. Box 787
John F. Bryan, III
Drawer 1529
Charles Gray Burdick
Box 787
French Caldwell
P. O. Box 149
Joe R. Colingo
P. O. Box H
James H. Colmer
P. O. Box 787
John Gordon Corlew
2312 Meadowbrook Dr.
Dan Costello
P. O. Box 2248
Arvis Cumbest
P. O. Drawer 1287
Donald W. Cumbest
P. O. Drawer 1287
Ronnie Donald Cumbest
Box 1287
William B. Dorsey
706 Watts Avenue
Guy C. Faggard
Box 714
Alfred Lee Felder
Box 1087
Charles W. Ford
P. O. Box 100
Lester C. Franklin, Jr.
P. O. Box 1056
E. M. Galloway
Box 658
H. Bernard Gautier
P. O. Box 299
John D. Gautier
312 Canty Street
Rex Gordon
P. O. Drawer 1529
George W. Howell, Jr.
P. O. Box 149
Albert S. Johnston, III
P. O. Box 1087
Dewitt Russell Jones, Jr.
1503 22nd Street
Ransom P. Jones, III
Box 1607
William B. Jones
P. O. Box 100
Earl Leslie Koskela
Drawer 546
Jesse Elmo Lang
Box 481
Dempsey M. Levi
600 Delmas Avenue
Clinton E. Lockard
P. O. Box 909
Thomas J. Long
Box 277
Trent Lott
Drawer 1529
Kenneth W. Martin
Box 1303
Charles J. May, III
614 Washington Avenue
O. L. McLeod
P. O. Box 1263
C. R. McRae
Box 1692
Carl A. Megehee
P. O. Box 787
Roland J. Mestayer, Jr.
Suit 404
Pascagoula Moss Point
Bank Bldg.
Melvin L. Mitchell
P. O. Box 991
B. C. Moore
P. O. Box 1056
Joe A. Moore
P. O. Box 100
Joann Taylor Myers
2802 Monterey Ave.
William H. Myers
Drawer 1529
Edward S. Nelson
Drawer 1529
Robert H. Oswald
P. O. Box 189
Judge Merle F. Palmer
Box 59
William J. Palmer
Box 59
Marby R. Penton
Box 506
Roy W. Pike
Drawer 1469
Charles Pitcher
Box 1692
William J. Powers, Jr.
Box 1267
Willard L. Richardson
Box 966
Ernest R. Schroeder
P. O. Drawer 1529
Harold M. Seamen
2303 9th Street
Lloyd Y. Sexton
5006 Telephone Road
Frank E. Shanahan, Jr.
Box 1447
George M. Simmerman
104 S. Pascagoula St.
David A. Stewart, Jr.
Box 635
David D. Thomas
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